TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 103

MINNESOTA COMMERCIAL MEN'S ASSOCIATION,
PETITIONER,

vs.

MINNIE MAE BENN, AS EXECUTRIX OF THE ESTATE OF ROBERT J. BENN, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR CERTIORARI FILED JUNE 27, 1921.

CERTIORARI AND RETURN FILED DECEMBER 2, 1921.

(28,334)

(28,334)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 379.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION, PETITIONER,

vs.

MINNIE MAE BENN, AS EXECUTRIX OF THE ESTATE OF ROBERT J. BENN, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1921.

STATE OF MINNESOTA. IN DISTRICT COURT. 1
County of Hennepin. 4th Judicial Ditrict.

MINNIE MAE BENN, as Executrix of the Estate of ROBERT J. BENN, Plaintiff,

vs.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION, a corporation, Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff in the above entitled action 2
and for her amended complaint made pursuant to stipulation of counsel for the parties hereto, at the hearing in the above entitled court, complains of the defendant and alleges:

I.

That at all times hereinafter mentioned the District Court of the State of Montana ever since, and has been, and still is a Court of general common law and equity jurisdiction, both original and appellate, duly constituted, established and acting under and by virtue of the laws of the state of Montana.

2.

That on the seventeenth day of May, 1916, plaintiff here- 3
in commenced an action as above entitled in the District Court of the Eleventh Judicial District of the State of Montana, in and for the county of Flathead, by the issuance of summons, and as required by the laws of the state of Montana, by the service of said summons and complaint against the above defendant upon the then acting and duly authorized Insurance Commissioner of the state of Montana, and also upon the then acting Secretary of State, by handing and leaving with said Insurance Commissioner, and said Secretary of State, on the 17th day of May, 1916, a true and correct copy of said summons and complaint in said action; that forthwith said summons and complaint and notice of the pendency of said suit aforesaid, was sent by the above mentioned officers of said state of Montana, to the defendant at its

4 main office in the city of Minneapolis, said county and state, and in the due course of mail, the said defendant received same, and thereupon the above defendant duly appeared specially by counsel in said action, and by motion objected to the jurisdiction of the District Court of State of Montana over the defendant, upon the sole and specific ground only, that the said defendant had not been served with summons in said action, and that the service hereinbefore referred to was not binding upon a non-resident Insurance Company such as the above defendant on said motion claimed itself to be. Upon the hearing of said motion, the same was by the Court overruled, and in all things denied, and thereupon the said defendant failed to appear and answer the plaintiff's complaint in said action
5 within the legal time, or at all.

3.

That a duly authenticated copy of plaintiff's appointment as Executrix was filed with the Probate Court of Hennepin County, state of Minnesota, before this action was commenced.

4.

Plaintiff further alleges that at the time of the service of the summons and complaint herein, and for a long time prior thereto the statutory laws of the state of Montana provided as follows in respect to the licensing of foreign Insurance Companies in the state of Montana, and the service of process upon them to-wit:

Revised Code of Montana 1907, Sec. 4061.

6 "4061 (Sec. 669). Foreign Insurance Companies.—It is unlawful for any insurance corporation or company, organized or associated for any of the purposes specified in this chapter, incorporated by, or organized under the law of any other state or the United States, or any foreign Government, directly or indirectly, to take risks, or transact any business of insurance in this state, unless possessed of $200,000.00 of actual paid up capital, exclusive of assets of any such corporation or company, as shall be deposited in any other state or territories, or foreign countries, for the special benefit or security of the insured therein; and any such companies desiring to transact any such business, as aforesaid, by any agent or agents in this state, must appoint one attorney in each county in which agencies are established, resident at the county seat, and

must file with the State Auditor, a written instrument, 7
duly signed and sealed authorizing such attorney of such corporation to acknowledge service of process, for and in behalf of such company in this state, consenting that such service of process, mesne or final, upon such attorney shall be taken and held as valid as if served upon the company, and also a certified copy of their charter, or articles of incorporation, together with a statement under the oath of the President or Vice President, or other Chief officer, and the Secretary of the Company for which they may act stating the name of the Company, and the place where located, the amount of its capital, with a detailed statement of the facts as required from corporations, organized under the laws of this state; such statement shall also show to the full satisfaction of the State Auditor that said Com- 8
pany if organized without the United States of America has deposited in some one of the United States or territory, a sum not less than $100,000.00 for the special benefit or security of the assured therein, and shall file, also, a copy of the last anual report, if any, made under any laws of the state, territory, or foreign country, by which said company was incorporated, and no agent shall transact business for any company whose capital is impaired by the liability as stated in Sec. 4058, of this section to the extent of twenty per cent thereof while such deficiency shall continue. It is unlawful for any person to act for any Insurance Company or corporation referred to in this Chapter, directly or indirectly in taking risks, or 9
transacting business in this state without procuring from the State Auditor a certificate of authority that such company or corporation has complied with all the requirements of this Chapter."

Revised Codes of Montana, Supplement 1915, Sec. 4062, 4017, and 6519.

"4062. Foreign insurance companies.

It shall not be lawful for any insurance company association or partnership, organized or associated for any of the purposes specified in this chapter, incorporated by, or organized under the laws of any other state, or the United States, or any foreign Government, directly or indirectly, to take risks or transact any business of insurance in this state, unless possessed of $200,000.00 of actual paid up capital, exclusive of any assets of any such

10 company as shall be deposited in any other states or territories, or foreign countries, for the special benefit or security of the assured therein; any such company desiring to transact any such business as aforesaid by any agent or agents in this state, shall appoint one attorney in fact in each county in which agencies are established, residents of such county, and shall file with the State Auditor a written instrument, duly signed and sealed authorizing such attorney in fact of such Company to acknowledge service of process, for and in behalf of such company in the state consenting that such service of process mesne or final upon such attorney, shall be taken and held as valid as if served upon the company to the laws of this state, or any other territory or state, and waiv
11 ing all claim of right or error by reason of such acknowledgment of service, and also that in case of death, absence, or if for any other cause, service of process cannot be made upon the attorney so appointed, service of process may be made on the State Auditor and Insurance Commissioner ex officio of this state, or his successors in office, with the same power and effect as that served upon such agent; and such power of attorney cannot be revoked or modified (except that a new one may be submitted) so long as any policy or liability remains outstanding against said company in this state. Whenever such lawful process against any insurance company shall be served upon the commissioner he shall forthwith forward a copy of the process served on him by mail, postpaid, and directed
12 to the Secretary of the Company, or in case of companies of foreign countries, to the resident managers, in this country; and shall also forward a copy thereof to the General Agent of said Company in this State. Said company shall also file a certified copy of their charter or deed of settlement, together with a statement under the oath of the president or vice-president, or other chief officer, and the secretary of the company for which they may act, stating the name of the company and the place, where located, the amount of its capital with a detailed statement of the facts and items, as required from companies organized under the laws of this state as per Sec. 3920 (583) hereof; such statement shall also show to the full satisfaction of the State Auditor and insurance commissioner ex officio that said company, if organized without

the United States of America, has deposited in some one of the United States or territories, a sum not less than 13
$100,000.00 for the special benefit or security of the assured therein, and shall file also a copy of the last annual report made under any law of the state, territory or foreign country by which said company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by the liabilities, as stated in Sec. 3920 (583) of this Chapter, to the extent of twenty per cent thereof while such deficiency shall continue; provided that any company formed for the purpose of carrying on the business of plate glass, health, accident, live stock, steam boiler, hail and cyclone, credit or other liability insurance, both foreign and domestic, shall have not less than one hundred dollars of capital 14
stock subscribed, fifty per cent of which shall be paid up in cash, and invested as provided by the laws governing the investment of capital stock of fire insurance companies. (Amendment approved Feb. 28th, 1913; Laws 1913, page 54).

4017 License Fee.

"All insurance corporations, associations and societies, as hereinbefore specified in the preceding section, before commencing to do business in the state of Montana, shall be required to secure a license, authorizing them to transact business of insurance corporations, associations or societies, and shall pay to the state Auditor, for such license, the following fees:

For a license to collect in any one year premiums 15
amounting to five thousand dollars or less, one hundred twenty-five dollars.

For a license to collect in any one year premiums over the sum of five thousand dollars, the sum of twenty dollars for each and every $1,000.00 to be so collected; Provided that, where any insurance corporation, association or society has fifty per cent of its capital stock invested in Montana securities, such insurance corporation, association or society, shall be allowed to deduct whatever tax it may have already paid from the amount due for such license fee or tax, as herein provided." (Amendment approved Mch. 4th, 1915; Law 1915, page 91).

6519. Subdivision 3. Service on Corporations.

"Any corporation organized under the laws of the state

of Montana, or doing business therein, may be served with summons by delivering a copy of the same to the president, secretary, treasurer, or any other officer of the corporation, or to the agent designated by such corporation, as the person upon whom service shall be made as required by law, and if none of the persons above mentioned can be found in the county, then service may be made upon any Clerk, Superintendent, general agent, cashier, principal director, ticket agent, station keeper, managing agent or other agent, having the management direction or control of any property of such corporations. If none of the persons in this section described, can be found in the county in which such action is commenced, then service may be made, as provided in this section upon any of the persons herein described in any county of this state. And if none of the persons above named can be found in the state of Montana, and an affidavit stating that fact shall be filed in the office of the Clerk of Court in which such action is pending, then the clerk of the Court shall make an order authorizing the service of the summons to be made upon the Secretary of State, who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said Secretary of State, shall be deemed personal service upon said corporation." (Amendment approved Feb. 18th, 1915; Laws of 1915, page 31).

5.

Plaintiff further alleges at the time of the service of the summons and complaint herein the Statutory Laws of the state of Montana provided as follows in respect to the interest payable on judgments, to-wit:

"5214 Interest, Judgment. Interest is payable on judgment recovered in the courts of this state at the rate of eight per cent per annum, and no greater rate, but such interest must not be compounded in any manner or form" (Act approved Feb. 28, 1899 6th Session 125).

6.

That thereafter such proceedings were had in said District Court within and for said state of Montana, that on the 24th day of October, 1917, a judgment for the sum of six thousand five hundred forty-five and 90/100 ($6,545.90) Dollars was duly made and entered upon the

merits by the said court in favor of the above plaintiff and against the above defendant.

7.

That a certified and authenticated copy of the judgment roll entitled Minnie Mae Benn as Executrix of the Estate of Robert J. Benn, v. Minnesota Commercial Men's Association, a corporation, is marked Exhibit "A," and made a part hereof as fully as though pleaded herein.

8.

That said judgment of six thousand five hundred forty five and 90/100 ($6,545.90) Dollars in favor of this plaintiff and against the above defendant is still in full force and wholly unsatisfied; that neither said judgment or any part thereof has ever been paid, and there is now due thereon from the above defendant to this plaintiff the sum of six thousand five hundred forty-five and 90/100 ($6,545.90) Dollars with interest thereon since Oct. 24th, 1917, at the rate of eight per cent per annum.

Wherefore plaintiff demands judgment against the above defendant for the sum of six thousand five hundred and forty-five and 90/100 ($6,545.90) Dollars, with interest thereon from Oct. 24th, 1917, at the rate of eight per cent per annum, together with her costs and disbursements herein.

A. A. TENNER,
Attorney for Plaintiff,
502-3 First Nat'l. Soo Line Bldg.,
Minneapolis, Minnesota.

T. H. MacDONALD, Esq.,
Attorney at Law,
Kalispell, Montana,
Of Counsel.

22 Exhibit "A," attached to Amended Complaint.

In the District Court of the Eleventh Judicial District of the State of Montana in and for the County of Flathead.

No. 4036

Minnie Mae Benn, as Executrix of the Estate of Robert J. Benn, deceased. Plaintiff.

vs.

Minnesota Commercial Men's Association, a corporation, Defendant.

COMPLAINT.

23 Plaintiff complains and alleges:

First: That on or about the 20th day of March, 1915, she was, by order of the District Court of the Eleventh Judicial District of the state of Montana, appointed executrix of the estate of Robert J. Benn, deceased, and that thereafter she immediately duly qualified as such, and ever since has been and now is acting as such executrix.

Second: That the defendant is now, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and at all of said times issued certificates and policies whereby upon the death or other physical disability of the assured under such certificates or policies
24 resulting from accidental injuries, certain benefits, as shown in the certificate of membership and rules and by-laws of the defendant hereinafter set forth, were to accrue to the assured or his legal representatives or other beneficiary designated by him, which benefit, the accumulation or reserve, and emergency funds, and the expenses of the management and the prosecution of the business of such corporation were, and are, provided for by payments to be made upon assessments levied by the said corporation—which assessments were required by the corporation to be paid by all those holding such certificates or policies, and such assessments were not limited to a fixed sum; that defendant at the time of the commencement of this action is, and at all the times hereinafter mentioned was, engaged in the business of soliciting such

insurance and issuing such policies and certificates on the said assessment plan in the state of Montana.

Third: That on or about the 6th day of November, 1908, in consideration of the payment by the said Robert J. Benn of the sum of two dollars, and in the further consideration of the agreement of the said Benn to pay to the defendant such annual dues and such assessments as should be required of the said Benn to be paid to the defendant, the defendant, by its agents duly authorized thereto, insured the life of the said Benn, and agreed to pay to his estate or beneficiary, in the event of his accidental death, the sum of five thousand dollars, to be paid within ninety days after notice of death, and, as evidence thereof, made its policy or certificate of insurance in writing, a copy of which is hereunto attached, marked "Exhibit A" and hereby made a part of this complaint. That on or about the third day of May, 1911, the said Robert J. Benn received from the defendant a certificate of additional protection in the event of accidental death, by virtue of which the defendant, by or through its certificate aforementioned and its by-laws agreed to pay to the beneficiary of the said Robert J. Benn the sum of four hundred dollars in the event of his accidental death, providing such accidental death should occur after twelve months from the 3rd day of May, 1911, in consideration of which the said Robert J. Benn paid to the defendant the sum of two dollars, and other assessments to be paid after the said date; that a copy of defendant's by-laws mentioned in said certificate is hereunto attached, marked Exhibit "B," and made a part hereof.

Fourth: That a duly authorized agent of the defendant solicited the said Benn for the said contract of insurance, took his application therefor, together with his first payment thereon, in the city of Kalispell, county of Flathead, and state of Montana, where the said Benn resided; and that the said policy of insurance was duly delivered to the said Benn in the said Kalispell.

Fifth: That on or about the 5th day of March, in the year 1915, the said Robert J. Benn came to his death through external, violent, and accidental means, which caused him to receive bodily injuries which immediately, and independently of all other causes, resulted in the death of said Robert J. Benn; that the said cause of death

was more particularly bodily injury received in the form of a gun shot wound inflicted on the said Benn in the city of Kalispell, Flathead county, Montana, at the said date, by a third party for the sole purpose of burglary.

Sixth: That Minnie Mae Benn, who is the same Minnie Mae Benn as the plaintiff, suing as executrix herein, was, by the terms of the application for said insurance and the by-laws of the defendant, the beneficiary of the said Robert J. Benn under the certificates or policies of insurance above referred to; that she is the widow of the said Robert J. Benn and was his wife at all the times herein referred to, up to the time of the death of the said Benn; that for a valuable consideration she did, on the 28th day of December, 1915, sell and assign to the estate of Robert J. Benn, deceased, all her right, title, and interest in and to any amounts due or to become due her by virtue of the above named policies or certificates of insurance.

Seventh: That on or about the 8th day of March, 1915, the said Minnie Mae Benn duly notified the defendant of the accidental death of the said Robert J. Benn, and thereafter furnished such additional proof as was requested by the defendant with reference to the said accidental death.

Eighth: That up to the time of the death of the said Benn, all dues and all assessments required by the defendant were duly paid, and that the said Benn and the plaintiff each duly performed all the conditions of said policy of insurance on their part to be performed, and that said policy of insurance was in full force and effect at the time of the death aforesaid; that the five thousand four hundred dollars, which, by the terms of said policy was to be paid to the plaintiff on the death of the said Robert J. Benn, providing the same should be caused by external, violent, and accidental means, is now due and payable and that demand has duly been made therefor and the same has not been paid, nor any part thereof, and that the defendant has wrongfully repudiated the said policy and contract of insurance, and has refused and failed to pay the said amount, or any part thereof.

Wherefore plaintiff demands judgment against the defendant for the sum of five thousand four hundred dollars, together with interest thereon at the rate of eight

per cent per annum from the 8th day of March, 1915, and for costs of this action. 31

FOOT & MacDONALD,
Atorneys for Plaintiff.

STATE OF MONTANA, }
} ss.
County of Flathead. }

Minnie Mae Benn, being first duly sworn, deposes and says; that she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof, and that the stattements therein made are true of her own knowledge, except as to matters therein stated on information and belief, and as to those, that she believes them to be true.

MINNIE MAE BENN. 32

Subscribed and sworn to before me this 14th day of January, 1916.

T. H. MacDONALD,
(Seal) Notary Public for the State of Montana,
Residing at Kalispell, Montana.

My commission expires June 3rd, 1917.

EXHIBIT "A."

Health and Accident Assessment Rate $4.00
Insurance No. 2419. Age 45

The Minnesota Commercial Men's Association
Minneapolis, Minnesota.

By this Certificate of Membership Certifies that Robert J. Benn is a member of the Minnesota Commercial Men's 33
Association and is entitled to such privileges and protection as may be provided for in Articles Five, Six, and Seven of the By-Laws of the Association, relating to Benefits for Disabling Sickness and Benefits for Accidental Injury from which a claim for benefits arrive, and by the acceptance of this Certificate, he agrees to the several provisions and conditions of the said Articles of Incorporation and by-laws, in force on the date of this certificate or as they may thereafter be amended and changed.

In Witness Whereof, The Minnesota Commercial Men's Association at its home office in Minneapolis, Minnesota, has caused this Certificate to be signed by its President and Secretary and its corporate seal to be hereunto affixed this 6th day of November, A. D. 1908.

34 G. W. BARNES,
President.

(Corporate Seal)

A. J. ALWIN,
Secretary.

Accepted May 3, 1911. Additional Protection.

(Title of Cause).

AFFIDAVIT.

STATE OF MONTANA, }
} ss.
County of Flathead. }

T. H. MacDonald, being first duly sworn, deposes and says; that he is one of the attorneys of the plaintiff in 35 the above entitled action; that the defendant is a foreign corporation organized and existing under and by virtue of the laws of the state of Minnesota, and doing business in the state of Montana; that neither the president, secretary, treasurer or other officer of such corporation can be found in the state of Montana, or in the county of Flathead, and that such corporation has not designated any agent upon whom service of summons may be made as required by law, and that there is no clerk, superintenent, general agent, cashier, principal director, ticket agent, station keeper, managing agent, or other agent having the management, direction or control of any property of such corporation that can be found in Flathead county, or the state of Montana; that this affidavit is made for the 36 purpose of obtaining an order from the clerk of the above entitled court authorizing the service of summons to be made upon the Secretary of State in accordance with the provisions of subdivision 3, of Section 6519, of the Revised Codes of Montana, as amended by Chapter 2, of the Session Laws of the Fourteenth Legislative Assembly of the State of Montana.

T. H. MacDONALD.

Subscribed and sworn to before me this 19th day of January, 1916.

C. H. FOOT,

(Seal) Notary Public for the state of Montana.
Residing at Kalispell, Montana

My commission expires August 21, 1918.

(Title of Cause).

ORDER.

37

Due and proper affidavit having been made therefor,

It is hereby ordered that service of summons in the above entitled matter may be made upon the Secretary of State of the state of Montana.

SAMUEL McNEELY,
Clerk of the above entitled Court.
By R. N. EATON,
Deputy.

(Title of Cause).

SUMMONS.

The State of Montana sends greetings to the above named Defendants and to each of them:

38

You are hereby summoned to answer the complaint in this action, which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon one of you in each county wherein any of you reside, and to file your answer and serve a copy thereof upon the plaintiff's Attorneys within twenty days after the service of this Summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you, by default, for the relief demanded in the complaint.

Witness my hand and the seal of said court this 8th day of March, 1916.

SAM D. McNEELY,
Clerk.

39

By R. N. EATON,
Deputy Clerk.

(Seal)

STATE OF MONTANA, }
} Office of the Sheriff.
County of Flathead. }

I hereby certify that I received the within Summons on the eleventh day of March, 1916. That I personally served the within Summons on eleventh day of March, 1916, upon Minnesota Commercial Men's Association, a corporation, one of the Defendants named therein, by delivering a copy of said Summons to the Secretary of State of the state of Montana, to-wit, A. M. Alderson, as such

40 secretary of State, personally in the said county of Lewis and Clark.

That I personally served the within Summons on the Thirteenth day of March, 1916, upon Minnesota Commercial Men's Association, a corporation, one of the defendants named therein, by delivering a copy of said Summons to Commissioner of Insurance of the State of Montana, to-wit, William Keating as such Commissioner, personally in said county of Lewis and Clark.

That at the time when I served the within Summons upon the said A. M. Alderson, as Secretary of State and the said William Keating, as State Auditor and commissioner of insurance co-officio of the state of Montana, and at the same place I also served upon each of them a copy
41 of the Complaint upon which said Summons was issued by delivering said copy to each of them personally. That at the time and place I made service of process upon said William Keating, State Auditor, etc.

I also paid to him the sum of $2.00 as a serving fee, as required by law and demanded a receipt therefor, which said Wm. Keating State Auditor refused to give.

ROLLA DUNCAN, Sheriff.
By THOS. G. SPRATT,
Deputy Sheriff.

Sheriff Fees.

Service	$2.00
Copy, ...	
Fil. fee.	2.00
42 Mileage.	.40
Total.	4.40

Paid by Plaintiff on March 11 16.

(Title of Cause).

NOTICE OF MOTION.

To Messrs. Foot & MacDonald, Attorneys for Plaintiff.
Kalispell, Montana:

Sirs:

Take notice that on the affidavit hereto attached of which a copy is herewith served upon you, and on all the files, records and proceedings herein, the defendant appearing specially and solely for that purpose, will move the Court at a term thereof to be held at its Chambers in the Court House, in the city of Kalispell, in Flathead

County, and state of Montana, on April 12th, 1916, at 10 o'clock A. M., of said day, or as soon thereafter as 43
counsel can be heard, for an order setting aside and vacating the summons herein and the service thereof. The motion will be made on the grounds as follows:

1. That the defendant is a Minnesota corporation created and organized for the specific purpose to give its members conservative and reasonable health and accident insurance on a mutual plan at the least possible cost; and is restricted in accepting members to commercial traveling men, and professional men who become members of the Association.

2. That the defendant never has had and has not now any agent or representative, either in the state of Montana, or elsewhere. That in order to become a member 44
of the defendant Association, it is necessary that a voluntary application in writing is filed with the Secretary-Treasurer at its home and only office, in the city of Minneapolis, Minnesota, and not otherwise.

3. That the defendant herein never has made application to the Insurance Department of the state of Montana, for leave to do business in said state, and never has been and is not now licensed to do business in the state of Montana, neither is it now doing business nor has it done business in said state of Montana.

4. That the defendant has at no time entered into, issued or concluded any contract or contracts with any party or person or member of the Association within the state of Montana, either by itself or agent or otherwise. 45
But that all contracts between the Association and its members are concluded at its home office and only office, within the state of Minnesota, and not otherwise.

5. That said defendant during its entire existence has not had and has not now any property of whatsoever kind, either real or personal or mixed, situate in the state of Montana, and never has had and has not now any officer, agent or representative within the state of Montana, or elsewhere.

6. That the defendant at no time during its entire existence has ever done business or attempted to do business within the state of Montana, either by itself or otherwise.

7. That the pretended service of the summons in the

above entitled action upon the secretary of State of the
46 State of Montana, on or about March 11th, 1916, at which time said Secretary of State pretended to admit service for and on behalf of the defendant herein, of the summons in said action, is without right, authority of law, and is contrary to the statute of the state of Montana, and by reason thereof, void, null and of no effect.

9. That in order to become a member of the defendant association, it is necessary to file an application for membership at its office in the city of Minneapolis, Minnesota, and if found to be in compliance with the by-laws of the defendant, a certificate of membership is issued to such member, reciting in effect, that the by-laws of the association becomes and is the contract between the
47 parties, which said contract is made, concluded and takes effect entirely within the state of Minnesota, and not elsewhere or otherwise.

10. That the Court has no jurisdiction to hear, try and determine the alleged pretended cause of action by reason of the fact that there was no proper or legal service of the summons on said defendant.

Dated March 25th, 1916.

LOGAN & CHILD,
Kalispell, Montana
RIEKE & HAMRUM,
Attorneys for Defendant,
802 Metropolitan Life Bldg.,
Minneapolis, Minnesota.

48

(Title of Cause).

AFFIDAVIT.

STATE OF MINNESOTA, }
} ss.
County of Hennepin. }

A. J. Alwin, of the city of Minneapolis, Hennepin county, Minnesota, being duly sworn upon oath, says that he now is, and ever since the organization of the above named defendant, has been the Secretary-Treasurer thereof, which said Association is a Minnesota corporation, created, organized and existing under and pursuant to the laws of the state of Minnesota, under a special statute, and was created for the purpose of giving its members conservative and reasonable health and accident insurance

on a mutual plan at the least possible cost, and that the membership is restricted to commercial traveling men and professional men. 49

Your affiant further states on oath that the defendant above named, has its office and its only office at 429-431 Palace Building in the city of Minneapolis, Minnesota, and that he now is and ever since its organization has been in charge of and has the custody and control of all the books, records and papers of every kind and nature, pertaining and belonging to said association. And at all times has had and still has the management thereof, except such matetrs as come before the Board of Directors of said Association. And further says that said Association never has had and has not now any agent or representative of any kind to represent the above named defendant for the purpose of soliciting members for said association, either in the state of Montana or elsewhere, or at all. And further states upon oath that the only way to become a member of said Association is to file a written application by the appellant at the head office in said city of Minneapolis aforesaid, made out and submitted by himself without the intervention of any agent, officer or representative of said defendant. And further states on oath that said association has no other office or offices save and except as above stated; and that the defendant never has had and has not now any property in the state of Montana, either real, personal or mixed; nor are there any debts within said state of Montana owing to the defendant. 50 51

Your affiant further states on oath that said Minnesota Commercial Men's Association never has made application to the Department of Insurance of the state of Montana for leave or license to do business in said state, or in any other state of the United States, save and except that of the state of Minnesota, the state of its domicile, and that it is not now conducting any business in the state of Montana or in any other state other than its domicile; and never has done business in any other state other than the state of its domicile. And that if it has any members outside of the borders of the state of Minnesota, such members have become such by filing their application in writing for such membership with the defendant at its home office in the city of Minneapolis, Minnesota, with-

52 out the intervention or the solicitation of any officer, agent or representative whatsoever.

Your affiant further states on oath that he knows of his own knowledge that said defendant is not licensed to do business within the state of Montana, and that it has not attempted to procure a license within said state of Montana, and that it has not done any business or concluded any contracts within said state of Montana, and that if there be or have been any members of said association residing within the state of Montana, they have become such by filing their voluntary application with the association at the home office within the state of Minnesota, and not otherwise.

Your affiant further states upon information and be-
53 lief that on or about the 11th day of March, 1916, the plaintiff herein pretended to serve the summons upon the Secretary of State of the state of Montana, under the provisions of Chapter 22 of the Session Laws of Montana for 1915, and that thereafter and under date of March 14th, 1916, said Secretary of State wrote a letter to the Minnesota Commercial Men's Association, as follows:

"March 14th, 1916.

Minnesota Commercial Men's Association,
Minneapolis, Minnesota.

Gentlemen:

This is to notify you that on March 11, service of summons on behalf of your Company was served on me
54 in accordance with the provisions of Chapter 22 of the Session Laws of Montana, 1915.

Yours truly,

A. M. Alderson,
Secretary of State."

Which said letter was received in due course of mail by said defendant on March 17th, 1916, that the defendant herein had no notice or knowledge of whatsoever kind of any parties to said action, as to who the plaintiff might be or could be, or was, or as to what court in which such pretended action might be pending, or as to the county or district in which such alleged action might be pending. And had no notice of any kind as to the parties to said action. That thereafter, said defendant by and through its attorney, addressed a letter to said Secretary of State, asking for information concerning said letter

aforesaid. That thereafter and on March 20th, the following letter was received by defendant's counsel, A. V. Rieke, to-wit: 55

"March 20th, 1916.

Mr. A. V. Rieke,
Minneapolis, Minnesota.
Dear Sir:

Replying to your letter of March 17th, will say that the following is the title of the action brought against the Minnesota Commercial Men's Association:

Minnie Mae Benn, as executrix of the estate of Robert J. Benn, Deceased, Plaintiff,

vs.

Minnesota Commercial Men's Association, a corporation, Defendant. 56

Complaint.

This action was brought in the Eleventh Judicial District of the State of Montana, in and for the county of Flathead. The attorneys in the case for the defendant are Foot & MacDonald of Kalispell, Montana. The time within which you must answer is within twenty-one days from March 11th.

Yours truly,
A. M. Alderson,
Secretary of State."

That said Secretary of State pretended to admit service of summons in the above entitled action; and further states on oath that no copy of either summons or complaint has been received by the defendant herein; and 57 that the allegations or pretended allegations of any complaint are entirely unknown to the defendant. And that the defendant hereby objects to and denies the right of the Secretary of State, of the state of Montana to accept service of any summons or summons and complaint in any action of whatsoever kind by which it is sought to bring the defendant herein into court to answer any summons or complaint with the state of Montana, for the reason that the courts of the state of Montana have no jurisdiction to hear, try and determine any matter at issue between any party or person of its citizens and the defendant herein, for the reason that said defendant has not made application to the Department of Insurance of the state of Montana, for leave to do business in said state or at all.

and is not licensed as an insurance company, and is not
58 and has not been doing business within the state of Montana, either by itself or through officers, agents or at all; and further says that no other service or pretended service of any summons or summons and complaint has been made upon the defendant herein.

Affiant further says upon oath that the by-laws of the defendant association and the application on which the membership is based, forms the contract between the defendant and its members; and that it is provided in said by-laws that the courts of Minnesota alone have jurisdiction in any and all maters between the defendant and its members, save and except that said by-law is not intended to and does not abrogate the right to submit its dif-
59 ferences to arbitration as provided in said by-laws. Reference to said by-laws is hereby made and made a part hereof.

A. J. ALWIN, Secy-Treas.

Subscribed and sworn to before me this 25th day of March 1916.

A. V. RIEKE,
Notary Public.
(Seal) Hennepin County, Minn.

My commission expires Jan. 3, 1920.

(Title of Cause.)

JUDGMENT BY DEFAULT BY CLERK.

And now, on this seventeenth day of May, A. D. 1916,
60 comes the plaintiff by Foot and MacDonald, her attorneys and makes application for the entry of the default herein of the above named defendant and for judgment in this action against said defendant for the amount specified in the summons, including costs, and this being an action arising upon contract for the recovery of money or damages only, and it appearing by the sheriff's return upon the summons herein returned and filed, that said defendant has been duly served with summons in this action, and that the legal delay for pleading or answering herein has expired, and that no pleading answer, or appearance of said defendant except a special appearance on the part of the defendant for the purpose of setting aside the service of summons, the motion wherein was by the court denied; and it appearing that no further appear-

ance or answer within the time allowed by law, after the order overruling such motion was entered, has been made, 61
the default of said defendant is hereby entered herein.

And it is thereupon considered and adjudged, that the plaintiff Minnie Mae Benn as Executrix of the estate of Robert J. Benn, deceased, have and recover of and from the defendant Minnesota Commercial Men's Association, a corporation, the sum of five thousand nine hundred and fourteen and 80/100ths dollars ($5,914.80), and also the further sum of eleven and 90/100ths dollars being the amount of plaintiff's costs of this action.

Judgment entered this seventeenth day of May, A. D. 1916.

SAM D. McNEELY,
Clerk. 62
By R. N. EATON,
Deputy Clerk.

(Seal).

(Title of Cause).

DEFAULT.

In this action the defendant, Minnesota Commercial Men's Association, a corporation having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises, is hereby duly entered, according to law.

Attest my hand and the seal of said court, this 17th 63
day of May, 1916.

SAM D. McNEELY,
Clerk.
By R. N. EATON,
Deputy Clerk.

(Seal)

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64 (Title of Cause).

MOTION FOR CANCELLATION OF JUDGMENT.

Come now Foot & MacDonald, attorneys for the plaintiff herein and move the court that the judgment by default, entered herein by the clerk of this court on the 17th day of May, in the year one thousand nine hundred seventeen, be cancelled and annulled as void.

Dated this 24th day of October, 1917.

FOOT & MacDONALD,
Attorneys for Plaintiff.

(Title of Cause).

ORDER

65 It appearing to the Court that on the seventeenth day of May, in the year one thousand nine hundred and sixteen, the clerk of the above entitled court entered judgment in favor of the plaintiff in this action for the sum of five thousand nine hundred four and no-100ths ($5,904.00) dollars, and for eleven and 90-100ths ($11.90) dollars costs, and it appearing to the court that said clerk was without authority of law in the premises to enter the judgment.

It is therefore ordered, on motion of plaintiff's attorneys that such judgment be cancelled on the records of this court and that the same is hereby adjudged to be null, void and of no effect.

Signed in Chamber this 24th day of October, 1917.

T. A. THOMPSON,
66 District Judge.

(Title of Cause).

MOTION.

Come now Messrs. Foot & MacDonald, attorneys for the plaintiff in the above entitled action and move the court herein that the default of the defendant for failure to appear or answer in the above entitled cause, be entered by the clerk and for judgment, in accordance with the prayer of the complaint.

Dated this 24th day of October, 1917.

FOOT & MacDONALD,
Attorneys for Plaintiff.

(Title of Cause).

DEFAULT. 67

In this action the defendant Minnesota Commercial Men's Association having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises, is hereby duly entered according to law.

Attest my hand and the seal of said court this 24th day of October, 1917.

R. N. EATON, Clerk.
By A. R. ARMSTRONG,
Deputy Clerk.

(Seal).

68

(Title of Cause).

ORDER.

It appearing to the court that the defendant herein was duly and regularly served with summons in the above entitled action; that on the seventeenth day of May, in the year one thousand nine hundred sixteen, the said defendant entered its special appearance, coupled with a motion to quash the service of the summons herein; that such motion came on regularly for hearing in open court on the 27th day of April, in the year one thousand nine hundred sixteen; that all things being considered in the premises, the defendant's motion was, by the court denied, by order made and entered on the 27th day of April 69
in the year one thousand nine hundred sixteen; that defendant failed and refused to appear further and has made no appearance in this action.

Now, therefore, it is hereby ordered that the default of the defendant for failure to appear or answer, be entered and that the plaintiff have judgment against the defendant, in accordance with the prayer of the complaint.

T. A. THOMPSON,
Judge.

Dated October 24th, 1917.

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70 (Title of Cause).

JUDGMENT.

In this action the defendant having been regularly served with process, and having filed its special appearance coupled with a motion to quash the service of summons herein and said motion having been, by the court overruled and the defendant having failed to appear and answer the plaintiff's complaint herein and the legal time for answer having expired and no answer or demurrer having been filed, the default of defendant is hereby entered in the premises in accordance with law.

Now, at this day, on the application of Messrs. Foot & MacDonald, attorneys for the plaintiff, it is hereby ordered that judgment be entered herein against the said
71 defendant in accordance with the prayer of said plaintiff's complaint on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed that Minnie Mae Benn, the plaintiff do have and recover of and from said defendant the sum of six thousand five hundred thirty-four and no/100ths dollars, with interest thereon at the rate of eight per cent per anum, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in said action, amounting to the sum of eleven and 90/100ths ($11.90) dollars.

And it is further ordered, adjudged and decreed that said plaintiff do have execution against the property of the defendant for such amount.

72 Judgment entered this 24th day of October, 1917.

T. A. THOMPSON,
District Judge.

(Title of Cause).

MEMORANDUM OF COSTS AND DISBURSEMENTS. 73

Disbursements:

Sheriff's Fees service on Secretary of State and Insurance Commissioner	$4.40
Clerk's Fees	7.50
Stenographer's Fees	
Witness' Fees	
Total	11.90

STATE OF MONTANA, }
} ss.
County of Flathead. }

T. H. MacDonald being duly sworn deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action, and as such, is better informed rela- 74
tive to the above costs and disbursements than the said plaintiff; That to the best of his knowledge and belief, the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

T. H. MacDONALD.

Subscribed and sworn to before me this seventeenth day of May, A. D. 1916.

C. H. FOOT,
Notary Public for the State of Montana,
Residing at Kalispell, Montana.
My commission expires August 21, 1919.

(Title of Cause). 75

CERTIFICATE OF CLERK OF COURT.

I, the undersigned Clerk of the above entitled Court do hereby certify the foregoing to be a full, true and complete copy of the judgment docketed in judgment docket book two (2) page 173, entered in the above entitled action, of record in book of Judgments Book nine (9) on page 481. And I further certify that the foregoing papers hereto annexed constitute a true, full and correct copy of all papers filed in the above entitled action, except the judgment entered herein by the clerk of the above entitled court and cancelled by order of court.

Dated at Kalispell, Montana, this fifth day of December, 1918.

R. N. EATON,

76 (Seal) Clerk of Court of the above entitled Court.

I hereby certify that the foregoing is the signature of the clerk of the above entitled court and that the foregoing attestation is in due form.

Done in Chambers this fifth day of December, 1918.

T. A. THOMPSON,
Judge of the District Court of the Eleventh Judicial District in and for the State of Montana, County of Flathead.

Department of the Secretary of State of the State of Montana.

I, C. T. Stewart, Secretary of State of the State of Montana, do hereby declare and certify that T. A. Thompson,
77 whose signature appears in the attached instrument was on the fifth day of December, A. D. 1918, the lawfully elected, qualified and acting Judge of the District Court of the Eleventh Judicial District in and for the state of Montana, County of Flathead, and as such Judge of the Eleventh Judicial District was authorized and entitled to execute the certificate appearing in the attached instrument and his act should be given full faith and credit.

I further declare and certify that R. N. Eaton, whose signature appears in the attached instrument was on the fifth day of December, A. D. 1918, the lawfully qualified and acting clerk of court of the District Court of the Eleventh Judicial District in and for the state of Montana, county of Flathead, and as such clerk of court of the
78 above entitled court was authorized and entitled to execute the certificate appearing in the attached instrument and his act should be given full faith and credit.

In witness whereof, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this nineteenth day of January, in the year of our Lord, one thousand nine hundred and twenty.

C. T. STEWART,
Secretary of State.
By CLIFFORD L. WALKER,
Deputy.

(Seal).

State of Minnesota, County of Hennepin. In District Court, 4th Judicial District. 79

Minnie Mae Benn, as Executrix of the Estate of Robert J. Benn, Plaintiff.

vs.

Minnesota Commercial Men's Association, a corporation, Defendant

AMENDED ANSWER.

The defendant above named, for its answer to the complaint herein:

I.

Alleges that the defendant is a corporation organized and existing under the laws of the state of Minnesota, for 80
the object and purpose of giving to its members conservative and reasonable health, accident and specific benefit insurance, on a mutual plan, at the least possible cost, and that during all the time referred to in the complaint herein and hereafter referred to, it was duly licensed and authorized to and was, in the state of Minnesota, pursuant to such object and purpose, engaged in the business of giving to its members health, accident and specific benefit insurance on a mutual plan.

II.

That the action in which the supposed judgment referred to in the complaint herein against it was alleged to have been recovered arose upon an alleged certificate of membership in the defendant Association issued to Rob- 81
ert J. Benn, at and from the home office of the defendant Association in the state of Minnesota, pursuant to an application therefor made to and filed in said office by said Robert J. Benn; that the said certificate of membership, together with said application and the by-laws of the company, constituted the claimed contract of indemnity or insurance upon which said action was based; that such contract was so made in the state of Minnesota, and by its terms was to be fully performed in said state of Minnesota, and that it was a Minnesota contract and the making and execution thereof was a Minnesota transaction.

III.

That ever since its organization, the defendant has been, and still is, a non-resident of the state of Montana.

82 and a resident of the state of Minnesota; that the defendant, at the time said action was brought, and at all times prior thereto and thereafter, was doing no business in the state of Montana and had no office or agent within said state, and that the defendant never agreed or consented that it might be served with process by service on the Insurance Commissioner of the state of Montana, or upon the Secretary of said State, and never complied with or assented to any Statute of the state of Montana, providing for service of process upon non-resident corporations, and that no summons or complaint was served on the defendant in said action.

IV.

That the defendant never appeared in said action, except
83 specially for the sole purpose of objecting to the jurisriction therein, and that the said court had no jurisdiction of the person of the defendant when the alleged judgment was rendered and that said alleged judgment was and is wholly void and of no validity or effect.

V.

Defendant further alleges that the enforcement of said judgment in this action would result in taking the defendant's property without due process of law in violation of the 14th Amendment of the Constitution of the United States and contrary to Section 7 of Article I of the Constitution of the state of Minnesota.

VI.

Defendant denies each and every allegation in said
84 complaint contained, and each and every part thereof, except as hereinbefore admitted.

Wherefore, defendant asks that the plaintiff take nothing by this action and that it be hence dismissed, with judgment for its costs and disbursements herein.

RIEKE & HAMRUM,
Attorneys for Defendant,
327 Plymouth Building,
Minneapolis, Minnesota.

LANCASTER, SIMPSON, JUNELL & DORSEY,
Of Counsel.

(Title of Cause.)

AMENDED REPLY. 85

Comes now the plaintiff in the above entitled action, and for her amended reply to the answer interposed by the above defendant:

1.

Denies each and every allegation of new matter in said answer contained and each and every part thereof, except as may be herein admitted or qualified.

2.

Further replying plaintiff admits that the above defendant is a corporation organized under and by virtue of the Laws of the State of Minnesota for the purpose of transacting health and accident insurance, and that said defendant company was not at any time hereinafter or here- 86
inbefore mentioned licensed to transact business in the State of Montana.

3.

Further replying plaintiff alleges that at the time of the service of the summons and complaint, referred to in the complaint herein, and for a long time prior thereto, the Statutory Laws of the State of Montana provided as fol. laws in respect to the licensing of foreign Insurance Companies in the State of Montana, and the service of process upon them, to-wit:

"Chapter 39, Laws of Montana, Thirteenth Session, 1913:

"An act to amend Section 4062 of the Revised Codes of the State of Montana 1907, as amended by Laws of Mont- 87
ana 1909, relating to the manner in which Insurance Companies, associations or partnerships may transact business in the State of Montana."

Section 1. That Section 4062 of the Revised Codes of the State of Montana, 1909, be, and the same is hereby, amended so as to read as follows:

Section 4062. Foreign Insurance Companies—It shall not be lawful for any Insurance Company, association or partnership, organized or associated for any of the purposes specified in this Chapter, incorporated by, or organized under the laws of any other State, or the United States, or any foreign government, directly or indirectly, to take or transact any business of insurance in this State, unless possessed of two hundred

88 thousand dollars of actual paid up capital, exclusive of any assets of any such company as shall be deposited in any other states or territories, or foreign countries, for the special benefit or security of the insured therein; any such company desiring to transact any such business as aforesaid, by any agent or agents in this State, shall appoint one Attorney in fact in each County in which agencies are established, resident of such county, and shall file with the State Auditor a written instrument, duly signed and sealed authorizing such attorney in fact of such company to acknowledge service of process, for and in behalf of such company in the State consenting that such service of process, mesne or final, upon such attorney shall be taken, and held as valid as if served upon the Company to the
89 laws of this State, or any other territory or state, and waiving all claim of right or error by reason of such acknowledgment or service, and also that in case of death, absence, or if for any other cause, service of process cannot be made upon the Attorney so appointed, service of process may be made on the State Auditor and Insurance Commissioner, ex officio of this State, or his successors in office, with the same power, and effect as that served upon such agent; and such power of attorney cannot be revoked or modified (except that a new one may be submitted so long as any policy or liability remains outstanding against said Company in this State. Whenever such lawful process against any Insurance Company shall be serv-
90 ed upon the commissioner he shall forthwith forward a copy of the process served on him by mail, postpaid, and directed to the Secretary of the Company, or in case of Companies of foreign Countries, to the resident manager in this Country; and shall also forward a copy thereof to the general Agent of said Company in this State. Said Company shall also file a certified copy of their Charter or deed of settlement, together with a statement under the oath of the President or Vice President or other Chief officer, and the Secretary of the Company for which they may act, stating the name of the Company and the place where located, the amount of its capital with a detailed statement of the facts and items as required from companies organized under the Laws of this State as per section 3920 (583) hereof; such statement shall also show to

the full satisfaction of the State Auditor and Insurance Commissioner ex-officio that said Company, if organized 91
without the United States of America, has deposited in some one of the United States or territories a sum not less than One hundred thousand Dollars for the special benefit or security of the assured therein, and shall file also a copy of the last annual report made under any law of the State, territory or foreign country by which said company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by the liabilities, as stated in Section 3920 (583) of this Chapter, to the extent of twenty per cent thereof while such deficiency shall continue; provided, that any company formed for the purpose of carrying on the business of plate glass, health, accident, live stock, steam boil- 92
er, hail and cyclone credit or other liability insurance both foreign and domestic shall have not less than One hundred thousand ($100,000.00) Dollars of capital stock subscribed, fifty per cent of which shall be paid up in cash, and invested as provided by the Laws governing the investment of capital stock of Fire Insurance Companies.

Section 2. All acts and parts of Acts in conflict with this Act are hereby repealed.

Section 3. This Act shall be in full force and effect from and after its passage and approval. Approved Feb. 28th, 1913.

4.

Further replying plaintiff alleges that at the time of the service of the summons and complaint, referred to in 93
the complaint herein, and for a long time prior thereto, the Statutory Laws of the State of Montana provided as follows in respect to the licensing of foreign Insurance Companies in the State of Montana, and the service of process upon them, to-wit:

Chapter twenty two, Laws of Montana Fourteenth Session, 1915.

"An Act to amend subdivision three of Section 6519 of the Revised Codes of Montana, 1907, relating to the manner of serving summons upon corporations."

Section 1. That subdivision three of section 6519 of the Revised Codes of Montana of 1907 be, and the same is hereby amended to read as follows, to-wit:

Subdivision 3. Any corporation organized under the

94 Laws of the State of Montana, or doing business therein, may be served with summons by delivering a copy of the same to the President, Secretary, Treasurer, or other officer of the corporation or to the agent designated by such corporation as the person upon whom service shall be made, as required by law, and if none of the persons above mentioned can be found in the county then service may be made upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station keeper, managing agent or other agent having the management, direction, or control of any property of such corporations. If none of the persons in this section described can be found in the county in which such action is commenced, then service may be made as provided in this section, upon any of
95 the persons herein described, in any county of this state. And if none of the persons above named can be found in the State of Montana, and an affidavit stating that fact shall be filed in the office of the Clerk of the Court in which such action is pending, then the Clerk of Court shall make an order authorizing the service of summons to be made upon the Secretary of State, who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation; and service upon said Secretary of State shall be deemed personal service upon said corporation.

Section 2. All Acts and parts of Acts in conflict herewith are hereby repealed.

Section 3. This Act shall take effect and be in full
96 force from and after its passage and approval.

Approved Feb. 18th, 1915.

5.

That said Laws of the State of Montana as herein alleged were in full force and effect at all times referred to in all the pleadings in the above entitled action.

6.

Further replying plaintiff admits that the above defendant appeared specially in the State of Montana as more specifically appears from the judgment roll of the proceedings had in the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, and presented their proof and argued their motion attacking the jurisdiction of said District Court, within and for the Eleventh Judicial District of the State

of Montana, in and for Flathead County, which motion was denied; that thereafter the defendant above named took no appeal from said order denying its motion as aforesaid, and the time within which the defendant could appeal from said order has expired. 97

7.

That the defendant is now estopped to now urge or question the validity of said judgment referred to in the complaint herein.

8.

That at the time of the service of the summons and complaint in said action in the District Court, Flathead County, State of Montana, and for a long time prior thereto, the defendant was engaged in and conducting its insurance business in the State of Montana, and was then and there engaged in doing business in said State of Montana. 98

WHEREFORE, plaintiff demands judgment against the defendant as asked for in her complaint.

A. A. TENNER,
Attorney for Plaintiff.
502-3 First Nat'l Soo Line Bldg.,
Minneapolis, Minnesota.
J. H. MacDONALD, ESQ.,
Kalispell, Montana.
Of Counsel.

(Title of Cause.)

SETTLED CASE. 99

The above entitled matter came on for trial, without a jury, before the Hon. E. F. Waite, one of the judges of said court, on the 3rd day of February, 1920. A. A. Tenner, Esq., and J. H. MacDonald Esq., appeared for the plaintiff, and Messrs. Hamrum and Rieke and Messrs. Lancaster and Simpson appeared for the defendant.

Thereupon the following proceedings were had:

Mr. Simpson: It is admitted that the plaintiff was duly appointed executrix of the estate of Robert J. Benn, and is authorized to sue in this case.

Mr. Tenner: It is stipulated that Exhibit A may go into the record without objection.

Mr. Simpson: That is satisfactory.

Mr. Tenner: I offer Exhibit B in evidence.

100 Mr. Simpson: Defendant objects to the offer as incompetent, irrelevant and immaterial, and on the further ground that on its face there is no jurisdiction shown over defendant company.

The Court: Inasmuch as that is the gist of the action the offer is received subject to objection, unless you wish to argue it.

Mr. Simpson: I make the further objection that this offer is not relative to or within any issue made by the pleadings in this case.

The Court: The objection is overruled, but in overruling it I desire to say that I am not prepared at this first impression, whatever my impression may be, to determine this suit as it would be determined if I sustained. The
101 fact is I am not quite sure that the plaintiff has gone as far as he ought to go in order to make out the best case he can. On the present state of the record the ruling may stand subject to renewed objection.

Mr. Simpson: Exception.

Mr. Tenner: It is stipulated between counsel that the record may show that the judgment has not been paid.

Plaintiff rests.

THE DEFENDANT'S CASE.

Mr. Simpson: The defendant now moves for judgment that the action be dismissed on the ground that the plaintiff has wholly failed to sustain his cause of action or any cause of action against the defendant.

102 The Court: I do not know but that I ought to reverse my ruling. If this becomes a prima facie valid judgment only by virtue of the laws of Montana and the determination of the court on the face of the record that the defendant was doing business within the state of Montana so as to bring it within the provisions of the Montana law, I think instead of granting the motion to dismiss or ruling on the motion to dismiss at this time I will reverse the ruling upon the admission of Exhibit B and sustain the objection, but do so with the understanding that the ruling is made in order to open the way, if counsel so desires, for the introduction of proof as to the laws of Montana. So for the present the ruling overruling the objection is withdrawn and the objection is sustained.

Mr. Simpson: We are willing to admit all the stat-

utes. The statutes here involved, being Sections 4061 and 4062, of the revised code of Montana, Supplement 1919, 103
Section 4062 and 6519 set out in the reply, and Sections 1017 and 6519, subdivision 3, the latter also set out in the reply, are admitted and may be received in evidence, and a transcript of these sections is made a part of the record, subject to the right of plaintiff's counsel upon looking over it to correct any inaccuracies.

Mr. Tenner: Let the record show that the statutes specified are admitted as suggested by Judge Simpson, subject to comparison.

The Court: It may be so understood.

Mr. Tenner: I now re-offer Exhibit B, the judgment roll.

Mr. Simpson: The defendant offers the same objection as previously made,—incompetent, irrelevant and immaterial, not relative to any issue made in the pleadings in 104
the case, not within any of the issues, and the further objection on the ground that it does not show jurisdiction over the person of the defendant and further that it appears on its face that it is void.

The Court: The objection is overruled.

Mr. Simpson: We now re-new our motion to dismiss on the ground that plaintiff has failed to establish a cause of action.

The Court: Denied.

Mr. Simpson: The secretary of this company, Mr. Alwin, is sick with influenza. The witness whom we intend to call is in the secretary's office and is thoroughly famil- 105
iar with the operation of this company's affairs and has been since 1915 when he was connected with it. His knowledge of the records does not extend back to the time when the certificate was issued in 1908. There has been an understanding that we would use this witness the same as if the secretary were here. Then after his testimony is in we would stipulate that the methods of the company in respect to doing business at that time were the same as shown by his testimony.

PAUL CLEMENT,

was called as a witness and, being first duly sworn, testified as follows:

By Mr. Simpson:

Q. What is your name?

106 A. Paul Clement.
Q. What is your business?
A. Cashier Minnesota Commercial Men's Association.
Q. Where is your office or place of business?
A. Minneapolis, Minnesota.
Q. Where in Minneapolis is the office located?
A. 329 Plymouth Building.
Q. Are you in that office?
A. I work in the office.
Q. You know Mr. A. J. Alwin?
A. I do.
Q. Secretary and treasurer?
A. Yes, sir.
Q. Does he also work in that office?
107 A. He does.
Q. At the present time he is ill?
A. He is.
Q. Are you in your position as cashier familiar with the conduct of that office?
A. Yes, sir.
Q. The entire office force there?
A. Yes, sir.
Q. What is the office force, how many does it consist of?
A. The clerks number about fifteen.
Q. Mr. Alwin is secretary?
A. Yes, secretary, treasurer and general manager of the company.
108 Q. You in your position are in many respects his assistant, are you?
A. In many ways.
Q. Is there any other person in the office outside of Mr. Alwin who has the same familiarity with the details of the management of the company that you have?
A. No, sir, no one else.
Q. Showing you Exhibit 1, what is that?
A. That is the company's certificate of authority and license to do business for the year 1915.
Mr. Simpson: I offer Exhibit 1 in evidence.
Mr. Tenner: We admit that.
The Court: Received without objection.
Q. Has the defendant company continued as shown

by the records since 1908 to receive an annual license to do business in the state of Minnesota? 109

A. We must receive a license each March.

Q. And you received it?

A. Yes, every March.

Q. Did you see the license?

A. Yes, I have.

Q. Showing you Defendant's Exhibit 2 I will ask you what that is?

A. That is an application to the Minnesota Commercial Men's Association by Robert J. Benn for health insurance only.

Q. And attached to that is this Exhibit 3.—what is that?

A. That is a subsequent application for insurance 110 with the Minnesota Commercial Men's Association in which Robert J. Benn applied for accident insurance.

Mr. Simpson: I offer Exhibits 2 and 3 in evidence.

Mr. Tenner: No objection except our general objection.

The Court: Received.

Q. Did Benn have any other insurance with this defendant company?

A. Not according to our records.

Q. Then this application is the basis for the insurance as involved in this action?

A. It is the basis of the entire contract between the association and the member Robert Benn.

Q. I show you Defendant's Exhibit 4 and ask you what 111 that is?

A. That is a copy of the by-laws of the Minnesota Commercial Men's Association amended and adopted at the annual meeting of members of the association held at the home office in Minneapolis, Minnesota, January 2, 1915.

Q. Is that a copy of the by-laws now in force in the association?

A. They have since been amended, I believe.

Q. Do you know which by-laws have been amended since?

A. I could tell—

Q. Were these by-laws adopted in 1915 in force at the time of Benn's death?

112 A. They were.

Mr. Simpson: I offer in evidence defendant's Exhibit 4.

Mr. Tenner: No objection, except we have attached to a deposition the by-laws of this company for the year 1913, as an exhibit. If we find any material change we reserve the right to stand by the by-laws attached to the deposition under which Mr. Benn made application.

Q. When in the course of business of this association was the certificate issued to Benn?

A. The Minnesota certificate of Benn?

Q. Yes?

A. If I could refer to the record I could tell you (Referring to document). The original certificate, accord-
113 ing to our account with him, was issued the 6th of November, 1908.

Q. That was for health? That was the date—

A. That was the date the money was received for health insurance.

Q. Prior to the time that the certificate was issued was this application received by the home office,—Exhibit 2?

A. It was received prior to that because it had been acknowledged by the association before acceptance. This constitutes acceptance. I can tell by looking at the application the date of its entry.

Q. Well, look at this application?

114 A. It was made out the 2nd of November, 1908, and received at our office November 6, 1908, and accepted the same day of its receipt.

Q. Upon the date the acceptance of the certificate of membership was issued?

A. It was.

Q. Is there any other method of accepting members or issuing certificates of membership in this association than that?

A. That is the only way in which it was done.

Q. So in all cases the application must be sent in by the applicant and received by the home office?

A. It must, and it must also be passed on by a committee of the board of directors as to its desirability from the insurance standpoint before it is accepted.

Q. Then it is accepted at the home office?

A. Accepted or rejected at the home office. 115

Q. The certificate is issued from the home office if the application is accepted?

A. It is.

Q. You have already testified that your company is licensed to do business in Minnesota?

A. Yes, sir.

Q. Is your company licensed to do business in any other state?

A. No, and never has been.

Q. And that would apply to the state of Montana?

A. Yes, as well as any other state excepting the state of Minnesota.

Q. Then you never have in compliance with the Mon- 116
tana insurance laws or the statutes received in evidence applied in Montana for license to do business in that state?

A. No, sir, we never have.

Q. And no license has been issued to you?

A. No, sir, no such license has ever been issued to us.

Q. Have you ever in any manner, that is, through any action of the company, authorized anybody in the state of Montana to represent you or accept service of process in any suit against the company?

A. We never have.

Q. Have you ever had in the state of Montana any agent who transacts business for the company or who 117
represents the company in the state of Montana?

A. We never had an agent—

Mr. MacDonald: I object to the question as too indefinite.

Mr. Simpson: I want to make it as broad as possible.

A We never have had an agent in Montana

Q. To cover the whole situation,—is that true of every state except the state of Minnesota?

A. That is true of the state of Minnesota. We are not permitted to have an agent in the state of Minnesota under the state laws.

Q. You mean then that your business is transacted under a license by the officers at the home office?

A. Entirely.

118 Q. Not by an agent?

A. No agent is used by the company.

Q. What is the policy of the company in having no agent, and how does it secure its new members?

A. A large percentage of new members come directly through advertising. It takes the form of a direct appeal in circular letters to commercial travelers by means of which we can get our project before the public. The cost of our insurance is so low that it would be a sufficient inducement to the ordinary man to take insurance with us without any further solicitation.

Q. That argument is put out in any matter that you deem to be effective in reaching traveling men?

A. In every possible shape.

119 Q. And you mail that advertising matter to traveling men whose names you obtain?

A. Yes, and we obtain them in all possible ways, and then we bombard them with all sorts of advertising to induce them to take out insurance with our association.

Q. Do the members of your association at times send in a list of commercial men to whom they suggest sending your literature?

A. They do. We urge them at all times to send in the names of persons to whom we can send our advertising matter.

Q. I note on the application of Mr. Benn received in evidence at the bottom, of this statement, "Recommended by Harry K. Harkness?"

120 A. Yes.

Q. Under the rules of your association is it necessary before an applicant is accepted that the applicant be recommended by any member of the association?

A. Not at all.

Q. As a matter of fact are applicants frequently received without such recommendation?

A. The majority are received without such recommendation.

Q. You may state in general what is the purpose of the association in furnishing a space for such a recommendation?

A. The intention of leaving that space is really to determine the returns from our various sorts of advertising.

Q. Showing witness Exhibit 5, what is that?

A. That is a circular leter which is mailed to members 121
of the association setting forth the plan of health and accident insurance carried out by the Minnesota Commercial Men's Association.

Q. Can you tell how lately that was sent out?

A. Sent out one within the last three months. It was sent out since last summer.

Q. This advertising matter contained in this circular is quite like the advertising matter you have been sending out in circulars for years?

A. Very similar. We have only a few printed forms we send out, and much of the matter is the same in all of our circulars.

Mr. Simpson: I offer Exhibit 5 in evidence.

The Court: Received without objection. 122

Q. I notice a statement here where you say that last but by no means least you do not employ agents to get business which would necessarily incur a tremendous expense. Is that one of the arguments you use in securing new members?

A. That is our greatest argument we have in getting new members. By that method we reduce our operating expenses at least one-third.

Q. Did you in times past send out advertising matter to the membership in which you offered premiums for getting members?

A. Yes, we have.

Q. What was the nature generally of those premiums? 123

A. They were in the nature of lapel buttons bearing our insignia with the member's number on the back, called identification buttons, also bearing our trade mark, also some pencils, what they called "never-break" pencils, pocket memorandum book, and things like that, on all of which appeared some advertising matter of the association which suggested to members to urge and recommend as many as possible to join the association.

Q. Showing witness Exhibit 6, is that the way all these circulars that you sent out for premiums were offered?

A. Yes, it is.

Q. Can you tell about when this one was sent out?

A. Yes, that was sent out in the summer of 1910.

124 Mr. Simpson: I offer Exhibit 6 in evidence.

The Court: Received.

By Mr. Tenner:

Q. You say this one was sent out in 1910?

A. Yes, sir.

Mr. Simpson: I wish to call the court's attention to this one page,—"We employ no agents."

By Mr. Simpson:

Q. This covers about the same ground as the statement referred to—

A. Yes, all of these offers were made once or twice a year.

Q. Have you since sent out any offers of premiums?

A. Some offers have been sent out, but later they were
125 practically withdrawn.

Q. In order to get new members of the association this advertising matter is sent to every member of the association who shows interest enough to apply for it?

A. Yes, that is true.

Q. Did you from time to time have applications from men who desired to be appointed agents of the company?

A. Very frequently they have written and asked what our proposition would be to represent our company in that particular territory.

Q. And that advertisement answered in substance all such applications?

Mr. Tenner: Objected to as incompetent, irrelevant and immaterial.

126 The Court: Sustained.

Q. Did you, or have you ever in response to such applications appointed a man as agent, or indicated in any way that he might act for or represent your company as an agent?

Mr. Tenner: I object to that, that has been gone over repeatedly, objected to as repetition.

The Court: I think it is covered by the testimony of the witness. He says they never authorized any agent.

Q. Showing witness Defendant's Exhibit 7, will you please state what that is?

A. That is a letter, mailed by the association to inquiries asking for the privilege of representing the association in the capacity of agent.

Mr. Simpson: We offer Exhibit 7 in evidence.

Mr. Tenner: That is objected to, it is merely a written answer to the other question. 127

The Court: Sustained.

Mr. Simpson: Exception.

Q. Has the association any property in the state of Montana of any kind or character?

A. None whatever.

Q. Has it ever had?

A. No, sir, it never has had.

Q. Has the association in the state of Montana a resident physician who was appointed to examine into the ills of members or accidents of members?

A. No, sir, never has had.

Q. Is that true of all other states except the state of Minnesota?

A. That is true of every state except Minnesota. 128

Q. And does not appoint physicians to make examinations in all cases of sickness or accident—

A. They are not appointed by the association.

Q. Have you in the state of Montana now, or did you have at the time of the death of Mr. Benn, or at any time, any person there who was authorized to adjust losses or make settlements with members?

A. Never have had to my knowledge.

Q. Who is authorized and who does adjust losses, and where are they adjusted?

A. The sole power to adjust a loss lies with the Board of Directors at the home office in Minneapolis.

Q. Now, in reference to the matter of payments to the company, or payments by the company, how is that handled? Do you require all assessments to be sent in to the home office? 129

A. We require assessments to be paid at the home office in exchange paid in Minneapolis.

Q. Did you ever draw drafts on members outside of the state of Minnesota?

A. Never draw a draft for any purpose.

Q. In the matter of the payment of benefits to members, either for sickness or indemnity for loss of time by accident or sickness, how are those payments made?

A. They are made after the claimant has complied with the requirements regarding proof, a certificate made

130 out by his attending physician and mailed to the office in Minneapolis.

Q. And then if a payment is to be made upon that proof, how is that payment made?

A. The payment is made if the claim is valid by issuing a check on the Minneapolis bank, signed by the secretary-treasurer and countersigned by the president.

Q. That check is payable at Minneapolis, on the Minneapolis bank?

A. In Minneapolis exchange, drawn on a Minneapolis bank.

Q. At times people draw on you drafts to cover losses allowed?

A. That is a very frequent occurrence, we have had
131 drafts presented at our office by claimants, but they have always been consistently turned down.

Q. Have you ever made a practice of paying drafts, drawn on you?

A. No, sir, we never have.

Q. Is that true not only of states of the United States but as to places outside, for instance, in Canada?

A. It is true of all payments made to members, wherever they might be. Canadian members receiving check in Minneapolis exchange—

Mr. Tenner: I object to the last part of the answer as not responsive.

The Court: The answer shows what the company does, and what he said about exchange is in evidence.

132 Recess was then taken until two o'clock.

Court convened pursuant to adjournment.

Mr. Tenner: It has been stipulated by both parties, and we would like to have the record show that the laws of Montana may be considered as pleaded and proven.

The Court: Very well.

Mr. Tenner: I wish to amend the complaint and amend the reply instead of a general denial—we will furnish to the Court for the record the proposed amended complaint.

Mr. Simpson: No objection. The amended answer stands as the answer in the case.

By Mr. Simpson:

Q. On what section of the Minnesota statute do you operate?

A. I don't recall the number, but I know there is a

special enactment.

Q. I think this is the one you operate under—(indicating)? 133

A. Yes, that is the one.

Q. Section 3536 Revised Statutes of 1913?

A. Yes, that's it.

Q. There have been some amendments subsequent to the matters involved here.

Mr. Tenner: Objected to as not pleaded and incompetent, irrelevant and immaterial. It is immaterial so far as this case is concerned.

Q. I notice by the Montana statutes that the insurance commissioner when served with a summons is required to forward the papers to defendant insurance company. I ask you whether or not a summons or any papers served 134 in this action referring to Exhibit "B," were forwarded to you by the insurance commissioner of Montana?

Mr. Tenner: Objected to as incompetent, irrelevant, and immaterial.

The Court: Overruled.

A. No such notice was ever received by the association.

Q. I think you have already testified, have you not, that there was no insurance carried by Benn in this company except that indicated by the health and accident policy?

A. Those are the only applications, or the only one received by the association.

Q. Were the certificates issued at one time?

A. The health and accident only, that is all he car- 135 ried.

Q. And under the by-laws what is the extreme limit of liability?

A. The contract provided for five thousand dollars as the liability of the association in case of accidental death.

CROSS EXAMINATION.

By Mr. Tenner:

Q. The method of doing business which you have described, the method of obtaining members, was being exercised in the state of Montana the same as in other states, was it not?

136 A. I do not believe we had anyone looking up members in Montana at all.

Q. You did not send your advertising matter to Montana as you did to other states?

A. Well, it is rather difficult to say, we sent our advertising matter to different places. Our advertising matter was prepared for members and we are desirous of giving it circulation, we are not concerned where they are located.

Q. You sent out your advertising matter to obtain names of prospective members?

A. Yes.

Q. And you obtain names in Montana in the same way that you obtain them in other states?

137 A. That is difficult to say. A traveling salesman covers a great deal of territory in his work. I do not doubt that many of our men traveled and circulated through Montana.

Q. But you do not know any method pursued in Montana that was different from the method in other states?

A. I would not like to admit that we pursued any method in Montana at all.

Q. Your method of obtaining members was the same in Montana that it was in other states?

A. I do not believe we obtained any members in Montana strictly speaking.

Q. You receive applications for insurance from Montana?

138 A. I would not say we did not.

Q. Your applications came from Montana pursuant to the same method you pursued to obtain applications elsewhere, did they not?

A. Any application that was received at the office, the treatment of the application was the same whether it came from Montana or anywhere else.

Q. (The question was read by the reporter)?

A. I presume our applications were from all over the United States.

Q. From Montana, as well as elsewhere?

A. Well,—

Q. Is that not true?

A. I cannot say that it is a fact. We might have rejected applications from Montana.

Q. Then the method is no different that you use to obtain applications in Montana than you use to obtain them in other states? 139

A. Oh, no.

Q. And your advertising was directed towards obtaining members in Montana the same as in other states, was it not?

A. Commercial travelers were scattered all over the country.

Q. But the methods by which you obtain members in Montana were the same as elsewhere, were they not?

A. Yes, I believe they were.

Q. Referring to this application of Robert J. Benn, recommended by Hill, membership 2953, that would indicate that Hill was a member of your association at that time? 140

A. Not conclusively.

Q. These policies were all sent to your members with your assessment notice, one of these application blanks, with the request that the member obtain a new member. Is that not correct?

A. Not necessarily.

Q. It was done to obtain new members, is that not true?

A. We urged any member to make applications.

Q. And at this time this application was received you were pursuing the policy of paying premiums to such members as would recommend other members, were you not? 141

A. No, sir, we were not.

Q. You were not pursuing the policy of giving premiums for obtaining new members?

A. We were not paying premiums, we were giving premiums in the form of advertising. We expected to obtain results, but we certainly did not consider it a payment.

Q. This application is dated Kalispell, Montana, the 2nd day of November, 1918. This application was mailed to the home office from Kalispell, Montana?

A. I really do not know.

Q. Why not?

A. There is nothing on the application to indicate that it comes from any particular place.

142 Q. Examine the application.

A. There is nothing on the envelop to show, there is nothing to show where it came from.

Q. You do not know whether this came through the ordinary course of business through the mail or not?

A. I could not tell that.

Q. Do you know whether the notice of assessment was mailed to Mr. Benn?

A. That would be difficult to tell. I could refer to his membership record. His last known address was Kalispell, Montana.

Q. Mr. Benn's address was what?

A. Kalispell, Montana.

Q. When was that address put on the record?

143 A. The custom was to change the address as often as the member changed location.

Q. Was that address changed?

A. I could not tell. It was redirected in compliance with the list as changed. It does not indicate whether it was listed or not.

Q. Did your records show if there was but one place of residence of Mr. Benn on your records?

A. It would show on the records.

Q. Have you got that record?

A. Not here.

Q. Have you at the office?

A. If he had any address, we would have it at the office.

144 Q. Have you examined the record in the Benn case?

A. Not for that purpose.

Q. Have you examined it?

A. Oh, yes, I have examined it, but not for that purpose.

Q. Did you observe if there was any other address of Mr. Benn than Kalispell, Montana?

A. No, sir, I was not looking for it.

Q. So far as your record shows, Mr. Benn's insurance assessment notices were always mailed to him at Kalispell, Montana?

A. I believe that is the address he asked us to mail it to.

Q. So far as you know, the record of the application

of Mr. Benn, dated at Kalispell, Montana, is the same as when it came into your office? 145

A. I think so.

Q. How are these applications commonly sent to your office?

A. That is difficult for me to say. I know how they are received.

Q. How are they received?

A. Probably the majority of them by mail, and perhaps a third of them come in person to deliver their applications.

Q. Was there ever a policy or method pursued by your company to the effect that you would direct that those members who were accepted were to solicit new members and they themselves take the application and mail it to 146 the home office?

A. We were not concerned with any application they might have.

Q. You merely sent them an application blank with the request that they send new members, and from time to time those applications would come back to you?

A. With a membership fee, yes.

Q. Did you ever mail your calendars to Montana advertising the commission part?

A. I don't know about Montana, but we mailed offers of premiums to which commercial men selected.

Q. When did you discontinue offering premiums for new members?

A. We never offered premiums, it was merely an ad- 147 vertising matter, and we discontinued that three or four years ago at the suggestion of the State Insurance Department. They said they did not like advertising of that nature and so we complied with their request.

Q. How long ago was that?

A. About three years ago, I would not be sure.

Q. You stated that you had no resident physician in the state of Montana. What method did you pursue to have members examined in case of accident or disability?

A. Our plan authorizes the attending physician to fill out a blank which is furnished him, and that gives us all the medical authority necessary to settle the claim.

Q. Where did you usually go or what did you usual-

148 ly do to get the information you desired by the method that you used?

A. If we could not get the attending physician we would write to some doctor whose name would appear in the directory as a reputable physician and ask him to fill out the enclosed blank to the best of his ability. Often we would find the attending physician and he would fill out the blank.

Q. In such a case would you pay him?

A. He would state whatever expense was incurred and we would pay it.

Q. Have you such an arrangement in Montana as well as elsewhere, such a method?

A. I don't know to the contrary.

149 Q. Do you know how many policies of insurance had been issued to a resident of Montana?

A. There is no way that I can tell you. There are many members that have addresses in two places.

Q. Would you say you had as many as two hundred?

A. I would hesitate to say how many. Members traveling about makes it difficult to tell.

Q. Have you not a large number of members in Montana?

A. No, sir, I would not say so. I find that the bulk of the traveling men live in the Twin Cities.

Q. You have members there, though?

A. I do not say we do not have, but I don't know that we have any.

150 Q. You pay losses there?

A. No, not that I know of.

Q. You pay losses to members who reside in Montana?

A. We might have paid losses to members who reside in Montana, but payment is made in Minneapolis.

Q. You pursued the same methods as to holding contracts in Montana as you did in other states, provided in your by-laws?

A. We had contracts in Montana.

Q. And you reserved that right?

A. The by-laws provided for that.

Q. And you did receive notice from the secretary of state that action had been served against you, a summons served?

A. Not to my knowledge.

Q. Have you examined the files in this matter? 151

A. Not relative to that particular point.

Q. You do not know whether you received notice or not?

A. I do not know that we did.

Q. You testified shortly before this that your company never received any notice from the state insurance commissioner?

A. That is true.

Q. You made that statement?

A. Yes, I did.

Q. You do not know whether you received notice of this action?

A. Not to my knowledge.

Q. Have you made an examination as to whether notices had been received by your company from the insurance commissioner? 152

A. No, sir, I did not, that is, I am not aware that we received any notice from the insurance commissioner of the state of Montana.

Q. Where would the notice be filed?

A. It might be filed in several places.

Mr. Tenner: I offer in evidence at this time a letter from the secretary of this state to the Minnesota Commercial Men's Association, advising them of the service of summons, Exhibit C. I also offer in evidence Plaintiff's Exhibit D, the same being the second letter from the secretary of state to the Minesota Commercial Men's Association in the same matter 153

Mr. Simpson: I want to object to them as incompetent, irrelevant and immaterial, the statute does not provide for it, it is not in compliance with any Montana statute.

The Court: The objection is overruled, and the exhibits are received.

Q. Did you ever examine the signature at the bottom of the exhibit, the exhibit marked A, of plaintiff's deposition?

A. Yes.

Q. Do you know whose signature that is?

A. That is a rubber stamp.

Q. Of whose signature?

154 A. Secretary-treasurer.
Q. The secretary-treasurer A. J. Alwin?
A. Yes.
Q. Have you with you a form of the blank for examination sent to your physician to make the examination?
A. No, sir, I have not.
Q. Will you bring one later?
A. Yes. In case of accident or sickness?
Q. Accident?
A. Yes.
Q. Bring both.
A. Yes, all right.
Q. Have you in your office any records showing the number of members in Montana residing in Montana at
155 the time of the accident in the Benn case in the year 1915?
A. No, we have not.
Q. Or at any time in that year?
A. I believe not.
Q. Have you any records of any payments to members who resided in Montana up to 1915?
A. I cannot say we have.
Q. Have you anything that you sent out from time to time showing losses paid?
A. Claim receipts?
Q. Showing addresses?
A. Yes, sir.
Q. Have you any of them for the year 1915?
156 A. I don't know. I would not want to state that.
Q. Don't you keep those claim lists?
A. Yes, we have copies of every one in the office.
Q. Will you bring such receipts if you have any?
A. Yes.
Q. Have you examined your records as to whether or not any investigation was made by any one for you in this case in the state of Montana?
A. Yes, I have. There was no examination made for us.
Q. There was no examination or investigation as to this accident made by anyone for you?
A. Not in our behalf.
Q. Have you ever employed the William Burns Detective Agency?

A. Not to my knowledge.
Q. Have you ever employed them? 157
A. I don't believe so.
Q. Are you willing to state positively of your own personal knowledge that there was no investigation made on your behalf by anyone in Kalispell, Montana, as to the facts surrounding the death of Robert J. Benn, and the facts as to the business he was engaged in at the time of his death?
A. I will say there was an investigation made.
Q. Did you obtain any information on that point?
A. Yes, we did.
Q. Through whom?
A. Our files.
Q. Through whom did you obtain the information? 158
A. Just by our own means.
Q. What means did you employ?
A. Outside of our files?
Q. Yes.
A. Our own files were sufficient for me.
Q. How did the information get into your files?
A. We would have someone make an investigation without going out of the office.
Q. Did you send anybody a request that they obtain information for you as to this case?
A. No, we did not.
Q. Did you send, or did you in connection with the Illinois Commercial Men's Association, obtain information as to this case through anyone? 159
A. We did not.
Q. You swear positively as to that fact?
A. I do. The Illinois Association asked us to use their adjuster and I declined. We told them we did not care to use their investigator.
Q. That was their association adjuster?
A. Adjuster or investigator, whatever he might be called.
Q. At the time you declined to use their adjuster did you have any information as to any investigation that had been made of this particular case?
A. Investigation they had made?
Q. Yes.
A. No.

160 Q. Did you give the Illinois Commercial Men's Association any information which resulted in investigation?

A. No, sir, they furnished us with a lot.

Mr. Simpson: Objected to as immaterial.

The Court: He has answered the question.

Mr. Simpson: I move that the answer be stricken out.

The Court: The answer may stand, denied.

RE-DIRECT EXAMINATION.

By Mr. Simpson:

Q. In one of the questions that were asked you, the term was used, "Obtain new members," with reference to advertising matter, that you sent out advertising matter to members that they should obtain new members. I
161 recall once or twice you explained it was to obtain the application of members. I ask you the question to clear that up: Have you ever asked any member of your association to obtain a new member of your association?

A. No, he would get a member by having him fill out an application.

Q. And that would be sent to you at the home office?

A. Yes.

Q. A reference has been made or a question asked in reference to examination by local physicians. I will ask you whether or not such examinations were frequently made?

A. They were not frequent for the reason that they
162 were made—

Mr. Tenner: You have answered the question.

Q. As a rule are your claims large or small?

A. Compared to the average old-line insurance company, our claims are perhaps large. They run in the neighborhood of sixty to seventy dollars for accident indemnities and forty to fifty dollars for sickness indemnities.

Q. In any claim, unless there are unusual circumstances, if the proof sent to the office is regular, would you be warranted in incurring any expense by way of making a legal investigation, or do you as a matter of fact make a legal investigation?

A. That is a matter of form. If a case is valid, if there is a valid claim, it is cheaper to pay it rather than make

a legal investigation.

Q. There was some reference to members in the state. 163
What is the fact as to members, are they treatd in your office as local addresses or legal addresses, or legal residences, or do you keep them on file simply to determine where notice should be sent to them?

Mr. Tenner: Objected to as self-serving.

The Court: Overruled.

A. The addresses are treated simply as a means of communication to the member. We send notices to them of assessments as they become due.

Q. As a matter of fact, is there any special relationship between the location of these men from time to time and these addresses that you have? These traveling men move about from state to state, so that these addresses 164
are simply for the purpose of having some place where you can send them legal notice.

A. They are for that purpose only. Our greatest difficulty is in keeping track of the location of our members.

Q. Have you had practical experience in cases of proof sent in by members—do you find addresses sent in with proofs showing illness or accident have any special relationship to the post office address that you have?

A. Not at all.

RE-CROSS EXAMINATION.

By Mr. Tenner:

Q. Mr. Clement, I believe you stated that your company did not authorize its members to obtain applications 165
for insurance for it. Is that correct?

A. They are not authorized to obtain applications.

Q. You say your by-laws do not authorize them to obtain applications?

A. No, sir.

Q. Mr. Clement, your by-laws provide that each member shall do everything that he can to forward the interests of the association.

A. Promoting the interests of the association.

Q. Is it not true that you have sent out circular letters in which you ask them to obtain applications and in which you called their attention—I will call your attention to this letter of March 1st that you have already seen, and to that particular part of it referring to the

166 by-laws, included in the sentence, "Read it over studiously and then file it with your certificate of membership. It embraces a binding contract that exists between the association and its membership." That refers to the by-laws, does it not?

A. That is correct.

Q. Do you know to what part of the by-laws that refers?

A. The section I presume you mean is Section 7 of Article 2, I think, entitled, "Membership."

Q. Read the section?

A. It is Section 8, Article 2: "Every member of this association shall use his influence to further the interests thereof. He shall furnish the secretary of the asso-
167 ciation with his address and shall notify him of every permanent change of the same. In case of any long-continued absence from the place of his address he shall designate some person to whom all notices may be sent, and also provide for the payment of any assessment that may in such time be made."

Q. Now, to what does that first paragraph of the letter I have shown you refer, if you know?

A. I would say that refers to the by-laws in their entirety and not to a particular paragraph.

Q. It speaks of a binding contract that exists between the association and its membership.

A. That is the whole of the by-laws, as I take it.

Q. And no particular part of what I have called your
168 attention to that you have just read?

A. It all refers to the by-laws.

Q. Read the concluding part of that letter..

A. "Rolling in those ten applications is as easy as falling off a log, if you only try. You know our proposition; possibly you've been paid a claim and have experienced the treatment the association gives its claimant members. Use it. If you land only one application a week the watch is yours by June 1st. One member sent in eleven applicants in two weeks and says, 'Its like picking roses.' Try it, the picking's good. Write us for for your bunch of ten blanks. You're going to get that watch. On the great clock of time there is but one word —'Now.' "

Q. You would not modify the statement that you have

just made in regard to the company's authorizing its members to obtain membership after the reading of that letter? 169

A. That speaks of applications,—a member might be authorized to get an application and obtain a member in that way.

Q. And your concern urges upon its members to obtain applications and cites the by-laws and states that it is a binding contract between the association and its membership.

A. That is to increase the membership of the association.

Q. That is correct, is it not?

A. They obtain applications of members.

Q. Section 7, on page 4— 170

A. That is the section I just read.

Q. And they urge upon them that it is particularly their duty to further the interests of the association in getting these applications?

A. Inducing members to join, new applications.

RE-RE-DIRECT EXAMINATION.

By Mr. Simpson:

Q. In answer to a question on cross-examination you said, "Inducing members to join." I will ask you if it is usual for a member to send in the application, or is it sent in by the applicants themselves?

A. Yes, so far as I know.

Q. It is what might be termed an open application, the members do not get these applications and send them in? 171

A. No, an—

Q. And that is why you use the phrase, "inducing members to join?"

A. A member cannot obtain a new member strictly speaking.

RE-RE-CROSS EXAMINATION.

By Mr. Tenner:

Q. You do not know who mailed these applications in?

A. No, but ordinarily they come direct, we can see that.

172 Q. From what? The signer or from where?

A. The signer, the applicant himself.

Q. Do you know whether he mailed it himself?

A. I don't know whether he mailed it himself, but his own money accompanies it. The money comes by check, as a general thing.

Q. Will you identify this signature (showing witness signature)?

A. I identify that as a fac simile of the signature of the secretary-treasurer, but that is a rubber stamp placed there by the man whose name it bears.

By Mr. Simpson:

Q. I think you testified that no application is accepted unless the membership fee accompanies the applica-
173 tion?

A. That is true.

Q. Is it not a fact that no member is authorized to take a membership fee and send it in with the application?

A. Yes.

Q. The membership fee must come direct to the company with the application?

A. I always assume it comes from the applicant, because the money is returned to the applicant in case of rejection.

By Mr. Tenner:

Q. The blanks that you send out are sent to members
174 and they may pass them to others for use, and they might send them in?

A. They are spread out in many ways; the applicant might write for them.

By Mr. Simpson: Do men sometimes write for an application?

A. Very frequently.

By Mr. Tenner:

Q. The payment for Mr. Benn was mailed to the company from Montana?

A. It does not show where it came from. I could not tell you where it came from. I know it was credited to his account.

Q. Have you any record where it was paid?

A. No.

Q. The assessment notice was sent where? 175

A. At the time of his death to Kalispell.

Q. Have you any record of sending any assessment notices to any place except Kalispell?

A. Not on this card.

Q. How many assessment notices are recorded on that card?

A. There are twenty-five assessments during his membership, but the card does not show that he paid twenty-five assessments.

Q. He was always notified in Kalispell?

A. As far as this card shows, yes.

Mr. Tenner: I offer in evidence Plaintiff's Exhibit E, the same being the record of the payment of assessments 176 by Robert J. Benn.

The Court: Received without objection.

Q. Mr. Clement, what are these dates referred to here on the card?

A. They refer to the date on which the payment of the assessment was received at our office.

Q. And Kalispell, Montana, refers to what?

A. The address, the residence address of the member.

By Mr. Simpson:

Q. Does it frequently happen, Mr. Clement, that the assessments or remittances are mailed from different cities, or different places than the post office address you have of the members?

A. Very frequently that is the case. 177

Q. Take people whose post office address is Minneapolis, they may receive assessment notices in almost any state in the union?

A. Yes, that is very true.

Q. They might be mailed in from different places?

A. They come in from everywhere.

Q. This card (indicating), indicates payments made by Mr. Benn on account of his insurance?

A. It indicates the payments made by Mr. Benn during his membership.

Q. Do you allow any funeral expense?

A. Only two forms, health and accident. He carried

178 health two and a half years before he took accident insurance.

Defendant rests.

REBUTTAL.

T. H. MACDONALD,

called as a witness, and, being first duly sworn, testified as follows:

By Mr. Tenner:

Q. What is your full name?

A. T. H. MacDonald.

Q. Where is your residence?

179 A. Kalispell, Montana.

Q. Your profession is what

A. Attorney at law.

Q. How long have you lived in Kalispell?

A. Since the middle of June, 1909.

Q. Did you know Robert J. Benn in his lifetime?

A. I did.

Q. And he died about when?

A. The 5th day of March, 1915.

Q. How long had you known him prior to that time?

A. Since I went to Kalispell.

Mr. Simpson: Objected to as immaterial.

The Court: Overruled.

Q. What year?

180 A. 1909.

Q. Did you frequently see Mr. Benn?

A. While I was in Montana I saw him almost daily during that time.

Q. During that time did you know Mr. Harkness?

A. Yes, sir.

Q. What was his name?

A. H. H. Harkness.

Q. That is to say during the time you knew Mr. Benn before his death you knew H. H. Harkness?

A. During part of that time.

Q. Did he live in Kalispell also?

A. No, sir.

Q. Did he live in Montana?

A. Yes, sir.

Q. And do you know whether Mr. Benn had any business outside of the state of Montana during that time? 181

A. I would not want to say as to that.

Q. He lived in Kalispell—was he married?

A. Yes, sir.

Q. Had a family?

A. Wife.

Q. Had a home there?

A. Yes, sir.

Q. Do you know whether he had any other residence in any other state?

A. Oh, no. I saw him almost daily during all of that time.

Q. Your answer is he did not have a residence in any other state?

A. He did not. 182

Q. As I understand from your testimony from the time you knew him when you met him in 1909 until the time of his death, he lived in Kalispell, Montana?

A. Yes, sir.

Q. And he had no other residence or domicile?

A. No, sir.

CROSS EXAMINATION.

By Mr. Rieke:

Q. I believe you said you saw Mr. Benn daily from 1909 until the time of his death?

A. Yes, almost daily.

Q. What business was Mr. Benn in? 183

A. Mr. Benn was the proprietor of a wholesale liquor house.

Q. Was he a traveling man?

A. Yes, part of the time he traveled. I believe he was a traveling salesman for a wholesale house and also traveling collector and auditor.

Q. How much of the time during the year did he travel?

A. I would not be able to say. The extent of his travel, as I remember it, was limited to a short distance on either side of Kalispell.

Q. Was his traveling confined to the state of Montana, or did it reach out beyond the confines of the state?

A. I would not say that it did not.

184 Q. And his business was wholesale?
A. They also had a retail establishment and hotel.
Q. Wholesale and retail liquor, and a hotel combined?
A. I don't know as to their being combined, but I know that the same two men conducted them.
Q. In the same building?
A. Yes, the same building.
Q. When Mr. Benn was not traveling on the road, what was he engaged in?
Mr. Tenner: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.
The Court: Overruled.
A. I think he assisted about the business in the whole-
185 sale department and sometimes I know that he also worked in the retail establishment.
Q. In other words, was he tending bar?
A. Part of the time he did. In the earlier part of the time I believe he did tend bar quite a good deal. He worked only occasionally.
Q. You do not know just how much time during the year he put in as a traveling salesman?
A. As I remember it, Mr. Benn made his regular trips on the first day or the second day of each week, and I would not want to be sure as to that exactly, I would not want to be sure as to when he made his trips, but it was only a part of his time that he was so engaged.
Q. When he would leave Kalispell how long would he
186 be away on a trip?
A. I would say he would go out one day and come back the next, that was about the size of his trips.
Q. Mr. MacDonald, in 1915, on the 16th day of June, 1915, your firm name was Foot & MacDonald?
A. Yes, sir.
Q. And you practiced law in Kalispell?
A. Yes.
Q. Did you at that time represent the defendant in this action?
A. We did, yes.
Q. The defendant?
A. Oh, pardon me. No, we never represented the defendant.
Q. Did you at any time represent the defendant in

any action in Montana?

A. No, sir, nor anywhere else. 187

Q. Then when the secretary of state of Montana said that Foot & MacDonald represented the defendant, that is not true, is it?

A. It certainly is not true that we ever represented the defendant.

Mr. Tenner: And I wish to offer in evidence the deposition of A. J. Burns taken in Montana, pursuant to notice.

A. J. BURNS,

Being first duly sworn, testified as follows:

By Mr. MacDonald:

Q. This is A. J. Burns, I believe? 188

A. Yes, sir.

Q. And you are now the manager of the Montana Hotel, in this city?

A. Yes, sir.

Q. In what capacity were you employed in the year 1915?

A. I was bookkeeper for R. J. Benn Liquor Company.

Q. You may state whether or not you had charge of Mr. Benn's correspondence at that time?

A. Yes, sir, I had charge of the correspondence of Robert J. Benn, of whose estate the plaintiff in this action is executrix.

Q. You may state whether or not you ever paid, for Mr. Benn, any assessments or premiums on insurance? 189

A. Yes, sir, I did.

Q. To whom?

A. Among others, the Minnesota Commercial Men's Association.

Q. You may state whether or not you received and opened any letters from the Minnesota Commercial Men's Association to Mr. Benn in that year?

A. Yes, every month, you might say. Every time there would be an assessment come, I would open it.

Q. Have you any of the letters that you received from them, for Mr. Benn, with you?

A. Yes, sir.

Witness shows to counsel Plaintiff's Exhibit A.

Q. Plaintiff's Exhibit A, then, was received by you

190 in the ordinary course of mail, was it, Mr. Burns?

A. Yes, sir.

Q. And for whom?

A. R. J. Benn.

Q. You may examine the signature at the bottom of that letter.

A. A. J. Alwin.

Q. Do you know who A. J. Alwin is?

A. He is the secretary of the Minnesota Commercial Men's Association. I would say that is his fac simile signature.

Q. Now, you may examine Plaintiff's Exhibit B, Mr Burns, do you know what that is?

A. It is an application for membership, a blank appli
191 cation.

Q. You may state how you received that?

A. I received that through the mail from the Minnesota Commercial Men's Association, addressed to R. J Benn.

Q. And you may state whether or not you have received other applications for him?

A. Yes, sir, I have.

Q. And with what request, if any?

Mr. Simpson: I object to the witness stating a conclusion.

The Court: Sustained.

Mr. Tenner: I offer in evidence Plaintiff's Exhibit A, attached to the deposition.

192 The Court: Received without objection.

Mr. Tenner: I offer in evidence Plaintiff's Exhibit B, attached to the deposition.

The Court: Received without objection

Q. You may state, Mr. Burns, how Mr. Benn's assessments of insurance would be presented to him and how they would be paid?

A. The assessment notice would be received in the ordinary course of the mail, together with letter or circular, and before the assessment would be due I would mail the check to the secretary at Minneapolis, Minnesota, to cover the amount.

Q. And how would the assessment notice be received?

A. They would send us a receipt for the amount; in fact, the receipt would come with the notice. We would

send it back with a check, and they would return the receipt to us. 193

Q. Do you know what the method of the defendant company, the Minnesota Commercial Men's Association, for obtaining new members in this state was?

Mr. Simpson: I object to the question covering the state.

The Court: Overruled.

A. Well, every time we'd get letters from them, which would be quite often, there would always be a request to increase the membership by at least one. There would always be an application for that purpose, and on some occasions they would offer a premium for the one that got a certain number of members.

Mr. Simpson: I move to strike out beginning with the 194
question, "You may state whether or not you know of any representative of the Minnesota Commercial Men's Association—" The last answer on the page shows his only means of information is that he was told that he was a representative of the Minnesota Commercial Men's Association.

The Court: Why not let the answers be read so that the reporter will get a record of it down to and including that one, and you can then move to strike it all out.

Q. You may state whether or not you know of any representative of the Minnesota Commercial Men's Association having been here to make investigation of this case?

Mr. Simpson: I object to that as incompetent, irrelevant and immaterial, and not proper testimony until he 195
shows his basis of knowledge.

The Court: I think the testimony had better be read and you can then move to strike out.

A. Yes, there was.

Q. When?

A. There was a representative of the defendant here a few days after the 5th of March, 1915.

Q. You may state whether or not he interviewed you?

A. Yes, sir, he did.

Q. What was the substance of the questions he asked you?

A. The questions he asked me were on the ownership of the business, whether Mr. Benn was the exclusive owner or a partnership.

196 Q. That was all?

A. That was all. It was the only thing he seemed to take up.

Q. Did he interrogate you as to the death of Mr. Benn?

A. No, he did not.

Q. How did you know that he was representing the defendant?

A He told me so.

Q. And was this interview, between you and the representative, in Kalispell, Montana?

A. Yes, sir.

Mr. Simpson: We move to strike out the eight preceding questions and answers as incompetent, irrelevant and immaterial and hearsay.

197 Mr. Tenner: The by-laws provide for investigation, and they make no other showing, so the answer should stand.

The Court: The motion is granted.

Q. Mr. Burns, Kalispell is something of a wholesale center for northwestern Montana, is it not?

A. Yes, sir.

Q. And there are a considerable number of traveling men with headquarters there?

A. Yes, sir.

Mr. Simpson: I move to strike out the last question and answer.

The Court: Motion denied.

Mr. Simpson: Exception.

198 Q. About what per cent of the traveling men, residing here, are insured in the Minnesota Commercial Men's Association, if you know?

A. About fifty per cent, or more, I'd say.

Mr. Tenner: I now wish to introduce the deposition of Walter Longfellow, of Kalispell, Montana.

WALTER LONGFELLOW,

being first duly sworn, testified as follows:

By Mr. MacDonald:

Q. This is Mr. Longfellow, of Kalispell, Montana?

A. Yes, sir.

Q. And your first name is?

A. Walter.

Q. And how long have you resided here?

A. I came here in August, 1910.

Q. I believe you are a member of the Minnesota Com- 199
mercial Men's Association, Mr. Longfellow?

A. Yes, sir.

Q. And how long have you been such?

A. Well, I think thirteen years. This is dated the 13th day of February, 1918.

Q. How did you become a member?

A. I was recommended by a member of the society, who handed me an application to fill out and return to the company.

Q. And have you, since 1908, been a member of the company?

A. I think there was one or two years that I dropped them. I was carrying two or three at the time, but rein- 200
stated again right away. I think it was over a year that I was out of it.

Q. Examine Plaintiff's Exhibit B, Mr. Longfellow—do you know what that is?

A. Yes, sir.

Q. What is it?

A. It is an application blank for membership to the company.

Q. Have you seen similar blanks to that before?

A. Yes, sir.

Q. About how frequently?

A. Well, every time that I would receive a notice from the house that there was an assessment due, which would be once every three months at least, and if I received a let- 201
ter in between those times, to notify me of some particular thing that might be taking place, there was always an application blank in them.

Q. With what request, if any?

A. That I should secure a new member for them.

Q. Have you ever secured any new member for them?

A. Yes, sir, I have.

Q. Will you please explain, Mr. Longfellow, how the insurance of such new members as you obtained was written or put on the books?

A. Why, the application blank would be filled out and then my name, and number of my certificate would be down here, recommending them. (Witness points to bottom of second page of application blank.)

Q. You refer to the last line, the word "Date," and

202 blank recommended by blank, and number blank, do you, Mr. Longfellow?

A. Yes, sir.

Q. What did you do with the application after filling it in?

A. Mailed it direct, or the party mailed it himself. As a rule they would mail it themselves. I would have an envelope and blank, and they would put in their check and send it direct.

Q. And who would issue the certificate of membership, if you know?

A. Well, I suppose the office force and Alwin, the secretary and treasurer of the company. I guess they are passed on by the board of directors first. It goes through
203 their hands, as I understand it.

Q. You may state whether or not, to your knowledge, the defendant in this case has pursued this practice of obtaining new members during all the time that you have been a member of that company?

A. Yes, sir, it has. That is the only way that they receive new members, as they have no solicitors direct from the company.

Q. Did you ever get any compensation for securing new members?

Mr. Simpson: I object to the question on the ground that the testimony shows that the premiums received were not in the shape of compensation.

The Court. Overruled.

204 Mr. Simpson: Exception.

A. They have at all times offered premiums in the way of watches, chains, etc. I received one or two, I would not say which. I received a watch fob once, what else I would not say, I do not just recall.

Q. And these premiums are offered for securing new members?

A. Yes, sir.

Q. You may state whether or not you have ever received any compensation for injuries from the defendant?

A. I have.

Q. In Kalispell, Montana?

A. In Kalispell, Montana.

Q. Were you examined by any representative of the company?

A. Why, not that I know of, for any injury. When I

was injured twice at the Flathead Wholesale, I was examined by my physician, Dr. A. T. Monroe. Blanks were 205
sent me, also him; and when I was able to go to work again they were filled out and signed by a notary public and returned to the company, stating the number of days or weeks, and a check was at once sent me for the amount, and of course I signed the release.

Q. Mr. Longfellow, have you a copy of the by-laws of the defendant?

A. I have.

Q. Is this the copy which I now mark Plaintiff's Exhibit C?

A. It is the by-laws that were in force six or seven years ago.

Q. You refer to Plaintiff's Exhibit C?

A. Yes, sir. 206

Q. How did you receive these by-laws?

A. Direct from the secretary of the company.

Q. In the ordinary course of the mail?

A. Yes, sir.

Mr. MacDonald: We offer in evidence Plaintiff's Exhibit C, as the by-laws of the defendant corporation.

Mr. Tenner I now offer in evidence the deposition of Maurice Beaudin, taken pursuant to notice.

Mr. Tenner: I offer in evidence Exhibits F to I inclusive.

Mr. Simpson: Two are for health and two for accident. The forms are exactly the same, and I do not think it is necessary to encumber the record with all of them. I ob- 207
ject to it as incompetent, irrelevant and immaterial, so far as the health blanks are concerned.

Mr. Tenner: I offer in evidence Exhibit F, containing the blanks of the defendant company used in their business, with the printed name of the secretary and treasurer on the back of the blank, and used by the attending physician to fill out with his statement.

The Court: Received without objection.

Mr. Tenner: We also offer in evidence Exhibit I, which is a blank of the Minnesota Commercial Men's Association used for the purpose of being filled out by the attending physician in case of accident.

The Court: They are received without objection.

Mr. Tenner: I also offer in evidence Exhibits G and H, blanks furnished by the Minnesota Commercial Men's

208 Association, to be used—

Mr. Simpson: I object to it as incompetent, irrelevant and immaterial in this case.

The Court: I will sustain the objection.

MAURICE BEAUDIN,

being first duly sworn, testified as follows:

By Mr. MacDonald:

Q. This is Maurice Beaudin, of Kalispell, Montana, is it not?

A. It is.

Q. How old are you, Mr. Beaudin?

A. Thirty-three years.

Q. Mr. Beaudin, in what busines are you engaged?

209 A. Traveling salesman.

Q. For whom?

A. F. A. Patrick & Company, of Duluth, Minnesota.

Q. Where are your headquarters, Mr. Beaudin?

A. Kalispell, Montana.

Q. You carry insurance with the defendant, in this action, the Minnesota Commercial Men's Association?

A. I carry the health insurance.

Q. Have you carried accident insurance with this company?

A. No.

Q. Have you ever received from them any circulars as to accident insurance?

A. I have, for the last six years.

210 Q. You may state whether you have any of those circulars with you?

A. I have one application here, which can be used for either health insurance or accident insurance.

Q. You refer to Plaintiff's Exhibit D?

A. Yes, sir, I do.

Q. Do you know how long this has been in your possession, Mr. Beaudin?

A. I do not recall exactly, because I get them quite often and usually try to keep one or two and throw the others away.

Q. How frequently?

A. Why, usually every time an assessment notice, or notice of an annual meeting, or any other business of any importance is received.

Q. With what request, if any?

A. To help build up the membership by securing additional members. 211

Q. Have you ever done so?

A. Yes, sir.

Q. In how many instances, if you remember?

A. I don't recall exactly how many.

Q. In what way would you use this application, Mr. Beaudin?

A. I would hand it to the prospect, and invite him to fill out the application or help him fill out the application, and would sign my name as recommendation.

Q. That is, recommending that insurance be issued to the applicant?

A. Yes, sir.

Q. What would you do with the application then?

A. If it was agreeable to the applicant I would mail it 212 to the company.

Q. For what purpose?

A. For securing credit for obtaining new members.

Q. Have you ever been awarded any remuneration for obtaining new members at any time?

A. I have.

Q. What did you receive?

A. I received a grip tag.

Q. Have you ever received any other?

A. That is all, I believe.

Q. You may state whether or not you know if the defendant has not in times past offered premiums to its members for obtaining new members?

A. They have offered other premiums. 213

Q. What?

A. It seems to me that they have offered numerous premiums, such as traveling bags, watches, and I believe, fountain pens.

Q. Do you remember when the last time was that you know of their offering these premiums, or any of them?

A. I do not remember now.

Q. You may examine Plaintiff's Exhibit A. Do you remember having received a similar letter, Mr. Beaudin?

A. I do remember of having received such a letter.

Q. Where is that letter now?

A. I can't say, as I destroy most literature of that nature.

Q. Have you made a search to find that letter?

214 A. I have.
Q. Have you been able to find it?
A. I have not.
Q. State if you know where the policy or certificate of insurance is issued by the company?
A. Minneapolis, Minnesota.
Q. And you stated, I believe, Mr. Beaudin, that these application blanks for membership are received with each assessment, notification of annual meeting or other business from the company?
A. Yes, as a general rule they are sent out with all mail that comes from the company.

PAUL CLEMENT,

215 re-called for further cross-examination, testified as follows:
By Mr. Tenner:
Q. Referring to Exhibit H, I ask you what that is?
A. That is a statement filled out by the attending physician to secure indemnity for sickness.
Q. Is it a form gotten out by your firm?
A. Yes, sir.
Q. How long have you been getting out these forms?
A. A year or so in this form.
Q. Were they ever any different?
A. We improve them from time to time.
Q. You add more questions, or give more information?
A. Not always.
216 Q. For illness this was the form that was used back in 1910?
A. That form for illness has always been used.
Q. How does the claimant get the form?
A. He gets it by mail, or it is handed to him, in person, after he gives us a regular statement of notice of intention to file claim for indemnity on account of sickness.
Q. As I understand it, in Mr. Benn's case, you were notified that he had received an injury, and when you were so notified you sent a blank to Montana to be filled out?
A. We sent it wherever he was.
Q. You would mail it to Montana?
A. Not unless we were requested to.
Q. If you had a request you would mail it wherever he requested?
A. Yes.

Q. Your passing the claim is based on the information that you get from the claimant on the blank? 217

A. We get nothing from the claimant on this blank, this comes from his doctor.

Q. I understood you to say it was sent to the claimant?

A. Yes, but it is filled out by the claimant's physician.

Q. You instruct him to hand it to the attending physician?

A. Yes, and send it to us within ten days filled out.

Q. And make investigation as to his claim on account of sickness?

A. This is intended to give us information, or a statement as to what is the matter with him.

Q. But you use the statement of the physician as to the justice of this claim?

A. That is all we have. 218

Q. That practice is no different in one state than it is in another?

A. We practice only in Minnesota.

Q. But you use the form in other states?

A. We use them only in Minnesota.

Mr. Tenner: I offer Exhibit H in evidence.

Mr. Simpson: The same objection as before.

The Court: Overuled.

Mr. Simpson: Exception.

Mr. Tenner: I show you Plaintiff's Exhibit G, and ask you what that is?

A. That is a statement somewhat similar to the last one, except this is the first statement from our physician

Q. Who is that made by? 219

A. The attending physician of the claimant.

Q. Exhibit G is used in sickness?

A. Sickness only.

Q. That is used in the regular course of business and has been used for several years?

A. That has been used for many years.

Q. They are sent out by the company in that form?

A. Sent to claimant where it appears he desires them.

Q. They are sent out when you receive an intention to make a claim—when you receive a notice of intention to make a claim on account of sickness?

A. Only when we receive notice of the intention to make a claim.

Q. What is the object on behalf of the company to send

220 that blank out? Why do you send that out?

A. That gives us a statement to the effect that the claimant was sick and entitled to indemnity.

Mr. Tenner: I offer Plaintiff's Exhibit G in evidence.

Mr. Simpson: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Simpson: Exception.

Q. Mr. Clement, in addition to these forms that we have just referred to, are there any other blanks that have been used within the last several years in connection with getting information concerning claims made by many members either for accident or health?

A. For accident and sickness, only.

221 Q. Only two?

A. There are only two, only health insurance and accident.

Q. I will ask you if a claimant, say a member in good standing from the state of Montana, claims to have had some disability, an accident, and has no physician and has filled out no medical blank?

A. We would inform him that he had no claim because he has no medical attention. There would be no liability on the part of the association.

Q. Are any blanks sent to physicians other than the attending physician?

A. We send out a blank to a physician where we ask for outside examination. We have two. One is used in
222 case of injury and one in case of sickness.

Q. I show you Exhibit K, and ask you what that is?

A. That is a physician's report of accident.

Q. The physical condition?

A. That is the idea.

Q. It is used to determine the physical condition of a man by the association. That is not used in the regular medical examination?

A. We have no regular medical examination.

Q. As I understood you to say before, when you find it necessary to make any outside medical investigation, you take from the list of some accredited addresses, the name of some doctor to make an investigation for you?

A. To make an investigation—to fill out the blank.

Q. And those are sent to—do you make any distinction as to what state you send them to?

A. Not in the least.

Q. It might be sent to Montana? 223

A. If a man was sick there, yes. We would be foolish to send a doctor to travel a long ways.

Q. Has that practice been in effect for several years by your company?

A. It dates back for a considerable time.

Q. Suppose a blank at the time of Mr. Benn's death had been sent to a physician at Kalispell, would you have sent Exhibit K out there?

A. Provided the man had not yet died?

Q. Yes.

A. In due course—

Q. Would you have sent that blank out there?

A. I doubt if we would have sent this blank.

Q. In case they required it? 224

A. We could not tell from the man's own blank whether there was anything wrong with it.

Q. And the blank, Exhibit K, would be from your own physician, the one that the company would select, that would be the selection of your own?

A. It would be our selection, but he would not necessarily be called our physician.

Q. Assuming he was not, he would be the one you would select?

A. Yes.

Q. Would you pay for the report?

A. At the bottom is a little statement—

By the Court:

Q. Would you pay for it? 225

A. Yes, sir.

Mr. Tenner: I offer in evidence Plaintiff's Exhibit K.

The Court: Received without objection.

Q. In respect to Exhibit J, tell us what that is?

A. That is a similar blank, except that it is intended in case where a member is sick.

Q. And you ask similar questions as those that appear in Exhibit K, except that the blank refers to illness?

A. Yes, sir.

Mr. Tenner: I offer Plaintiff's Exhibit J in evidence.

The Court: Received without objection.

Q. There were no other blanks used to determine what information was necessary in respect how to handle a claim?

226 A. There is no other form. In some cases we might write to the doctor and ask him for information by letter.

Q. Then we may understand that this is your method in the case of all of these blanks, that if they are answered carefully and fully it gives you all the information you need?

A. Yes, sir.

Q. Suppose the claim in question in Montana or any other place is sent to you on these blanks that are used, it would be sufficient for you to determine what position to take with respect to the claim—

Mr. Simpson: I object to that question. There is no question that has come up except in relation to Montana.

The Court: Yes.

227 RE-DIRECT EXAMINATION.

By Mr. Simpson:

Q. This blank is simply sent to a physcian of your selection?

A. Yes, that is all.

Q. That means it is the form of blank which you send to some physician whom you select to make report to you on that particular case?

A. Yes, that is the condition.

Mr. Tenner: I offer Plaintiff's Exhibit L in evidence.

The Court: Received without objection.

PAUL CLEMENT,

228 was re-called for further cross-examination, and testified as follows:

By Mr. Tenner:

Q. I want to show you Plaintiff's Exhibit L, and ask you if that is what your firm gets out every year?

A. It is published every year.

Q. And you publish one or more every year of this form, Exhibit L?

A. Yes.

Q. Do the list of names mean the claims paid during one year, 1919?

A. The title would indicate all claims paid in 1919.

Q. Have you any paid in 1915?

A. No.

Q. How long has the defendant company used this method of getting out a similar list?

A. It goes back prior to my connection with the association. 229

Q. Have you in your files a list of claims paid in 1915, paid in Montana or elsewhere?

A. No, sir, we have not.

Q. Or 1914?

A. I don't know about 1914.

Q. This does not purport to give a list of claims in certain states?

The Court: We are making too free a record; there is too much conversation.

Q. Have you a list, or have you any record of any claims, or have you a list showing residence of members as being in Montana in the year 1915?

A. No, sir.

Q. Is there anyone connected with your company who 230 would have such a list?

A. No, sir.

Plaintiff rests.

Defendant rests.

Testimony closed.

PLAINTIFF'S EXHIBIT "A."

Duly certified copy of Letters Testamentary in the Matter of the Estate of Robert J. Bean, deceased, on file in the office of the Clerk of the Probate Court in Hennepin County, Minnesota.

PLAINTIFF'S EXHIBIT "B." 231

Original certified copy of the Judgment Roll in the action between the same parties in the Eleventh Judicial District of the State of Montana, a copy of which appears as Exhibit "A" attached to the complaint herein.

PLAINTIFF'S EXHIBIT "C."

STATE OF MONTANA

Office of

Secretary of State

A. M. Alderson, Secretary.

Copeland C. Burg, Deputy.

March 14 1916

Minnesota Cmommercial Men's Assoc.

Minneapolis, Minn

232 Gentlemen:

This is to notify you that on March 11th Service of Summons on behalf of your company was served on me in accordance with the provisions of Chapter 22 of the Session Laws of Montana, 1915.

Yours truly,
A. M. Alderson
Secretary of State.

PLAINTIFF'S EXHIBIT "D."

STATE OF MONTANA
Office of
Secretary of State
A. M. Alderson, Secretary.

233 Copeland C. Burg, Deputy.

March 20 1916

Mr A V Rieke
Minneapolis, Minn

Dear Sir:

Replying to your letter of March 17th will say that the following is the title of the action brought against the Minnesota Commercial Men's Association:

MINNIE MAE BENN, as Executrix of the Estate of the Robert J. Benn, deceased. Plaintiff,

vs.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION, a corporation, Defendant.

234

COMPLAINT.

The action was brought in the Eleventh Judicial District of the State of Montana, in and for the County of Flathead. The Attorneys in the case for the defendant, are Foot & MacDonald of Kalispell, Montana. The time within which you must answer is twenty-one days from March 11th.

Yours truly,
A. M. Alderson
Secretary of State

PLAINTIFF'S EXHIBIT "E."

A card taken from the files of the defendant containing the record of the payment of assessments by Robert J. Benn of Kalispell, Montana, showing approximately

quarterly payments of $2.00 for health insurance from Nov. 6, 1908, to Dec. 12, 1914, and $2.00 for accident insurance from April 3, 1911, to Dec. 12, 1914, and the payment of annual dues of $1.00 for the years 1910 to 1915, inclusive; and containing a notation on the reverse side that he "met death—3-5-15". 235

PLAINTIFF'S EXHIBIT "F."

Blank form used by defendant for "Attending Physician's Statement and Affidavit" in cases involving accidents.

PLAINTIFF'S EXHIBIT "G."

"Attending Physician's Preliminary Report of Illness."

PLAINTIFF'S EXHIBIT "H." 236

"Attending Physician's Final Statement of Sickness."

PLAINTIFF'S EXHIBIT "I."

"Attending Physician's Preliminary Report of Accident."

PLAINTIFF'S EXHIBIT "J."

"Report of Association's Physician."

PLAINTIFF'S EXHIBIT "K."

"Association physician's report of Accident."

PLAINTIFF'S EXHIBIT "L."

A printed list of claims paid during the year 1919 showing the names and addresses of the claimants paid and the amounts paid each; and including a few letters of testimonial from some of these claimants. It includes approximately 1400 names, with addresses representing practically every State in the United States, (there being 14 Montana addresses listed); the amounts range from $1.43 to $3,000.00. 237

PLAINTIFF'S EXHIBIT "A" attached to Depositions.

G. W. Barnes,
President.

Jas. F. Garrow,
Vice-President.

238 Health and Accident Insurance for Commercial Men.
Minnesota
Commerical Men's Association
of Minneapolis, Minnesota
429-431 Palace Building

Indemnities	
$5000 For Accidental Death	$25 weekly
$5000 For Loss of Both Hands or Both Feet	for 104 weeks in case
$5000 For Loss of Both Eyes	of Accident
$5000 For Loss of one Hand and one Foot	$25 weekly
$2500 For Loss of one Hand or one Foot	for 104 weeks in case
239 $1250 For Loss of one Eye	of Sickness

A. J. Alwin, Secretary
20 years a Traveling Salesman
$50. Weekly in Case of Totally Disabling Injury on Steam Passenger Train

March 1st, 1915.

Fellow Member:—

Your copy of the new By-Laws as amended and revised by the members in annual meeting, Jan. 2nd, 1915, is enclosed with this letter. Read it over studiously and then file with your certificate of membership. It embraces the binding contract that exists between the Association and its membership.

The Association has a watch for you. Not a conglom-
240 erate of spineless springs and begging brass masked by a sheen of deceitful tinsel; but a genuine Waltham or Elgin movement encased in a warranted 20 Year Gold Case. The kind you find most Commercial and Professional men carrying who have knowledge of and love for a good timepiece. This Watch will be provided either in an open-faced or Hunting case, Gentlemen's or Lady's size

This is not a "FREE" offer. There is little or nothing free in this world and it is not the Association's policy to resort to deception. Buying these watches in large quantities it is possible for us to get them at prices away below what you would have to pay for them. On the strength of this we find it possible to give you a high-grade watch as a prize for ten applications sent in between now and June 1st, 1915.

You say you have a good watch. Then get one for your

wife or sweetheart. Possibly they too have been fully provided for; then get in touch with the Association and we will arrange to give you a satisfactory equivalent. 241

"Rolling in" those ten applications is as easy as "Failing off a log"—If you only try. You know our proposition; possibly you've been paid a claim and have experienced the treatment the Association gives its claimant members. Use it. If you but land only one application a week the watch is yours by June 1st. One member sent in eleven applicants in two weeks and says, "Its like picking roses." Try it; the picking's good. Write us for your bunch of ten blanks. You're going to get that watch. "On the great clock of time there is but one word—NOW".

Yours in the Contest,

A. J. Alwin.
Sec'y.-Treas. 242

PLAINTIFF'S EXHIBIT "B" attached to Depositions. "Application for Membership" blank without date.

DEFENDANT'S EXHIBIT "1."

Defendant's Certificate of Authority from the Minnesota Commissioner of Insurance to transact the business of accident and health insurance in the State of Minnesota for a year from March 1st, 1915.

DEFENDANT'S EXHIBIT "2."

Original application for membership signed by Robert J. Benn, dated Kalispell, Mont., Nov. 2, 1908, recommended by Harrie K. Harkness; stamped "Nov. 6, 1908" and "Accepted May 3, 1911, additional protection." 243

DEFENDANT'S EXHIBIT "3."

Original application for additional protection signed by Robert J. Benn, dated April 29, 1911, marked as an application for accident insurance and stamped "Accepted May 3, 1911, additional protection."

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244 DEFENDANT'S EXHIBIT 4.

By-Laws of the Minnesota Commercial Men's Association M C M A

Amended and adopted at the Annual Meeting of the Members of the Association held at the Home Office, Jan. 2, 1915.

Notice of Disability should be given promptly to the Association in Strict Accord with Article X of these By-Laws.

All Remittances should be sent and made payable to

A. J. Alwin, Sec.-Treas. Minneapolis, Minn.

Instructions

File these By-Laws with your Membership Certificate.
245 They contain the provisions by which the members and the officers are bound.

By-Laws of the Minnesota Commercial Men's Association

Amended and adopted at the annual meeting of the members of the association, held at the home office, Minneapolis, Minn., January 2, 1915.

ARTICLE I.

OBJECT.

The object of this association shall be to give to its members conservative and reasonable Health, Accident
246 and Specific Benefit insurance on a mutual plan at the least possible cost.

ARTICLE II.

MEMBERSHIP.

Section 1. Any male white person, of good moral character, enjoying good health, who at the time of making application for membership and for at east six months prior thereto, has been continously engaged in selling goods at wholesale as a traveling salesman, or a solicitor, buyer, auditor, collector; or the proprietor of a wholesale house, or a manager of a department thereof, or anyone engaged in commercial and professional pursuits provided he is not engaged at the time of said application in a business more hazardous than that stated herein, is eligible to membership in this association.

Sec. 2. All applications for membership shall be in

such form and language as shall be prescribed by the Board of Directors. No person shall be deemed a member of this association until his application has been accepted and a certificate of membership issued thereon. Every statement and representation made in the application shall be considered material and a warranty that it is true, and the applicant shall be bound thereby. Misrepresentation or false statements of any kind in the application shall render the membership void from its inception, and no claim against the association shall in any case be valid, and all moneys paid by the applicant in such case shall be forfeited to the association as liquidated damages. 247

Sec. 3. The applicant shall designate in his application the particular form of protection which he desires, and shall pay the membership fee and assessment rate as stipulated in the respective Article governing such protection. Provided that he may participate in any one or all of the several forms of protection provided by this association by paying the respective membership fees and assessment rate requisite thereto and as is provided and stipulated in Articles 5, 6, 7 and 8, of these By-Laws. 248

Sec. 4. The membership fee shall be $2.00 for each form of protection applied for in the application for membership, which forms of protection, and stipulations to maintain the same are set forth in Articles 5, 6, 7 and 8, and which membership fee shall in all cases accompany the application for membership. Provided in case the application is rejected said fee shall be returned to the applicant. 249

Sec. 5. Upon the acceptance of the application of any person for membership in this association there shall be issued to such person a certificate, signed by the President and Secretary and bearing the corporate seal of the association.

Sec. 6. If any member of the association shall change his business, occupation, or vocation, he shall immediately give the association written notice of such change.

Change of business, occupation, or vocation by a member (provided that he has given written notice to the home office at Minneapolis, Minn., of such change of occupation) shall not forfeit his right to membership herein, unless he shall enter employment which has been or may be

250 deemed by the Board of Directors as more hazardous than that named in his application for membership. The acceptance of assessments by the association shall not be a waiver of this provision. If a member shall change to a business, occupation, or vocation, deemed by the Board of Directors as more hazardous than that named in his application for membership, and if he shall fail to give such written notice as hereinbefore stipulated, then the association shall be liable for, and immediately return to any such member any and all assessments paid by him after entering such more hazardous occupation. And the association's check mailed to such member's last known address, covering such assessments, shall constitute proper return and payment of such liability on the part of
251 the association, and such payment shall satisfy and discharge any and all liability of whatsoever kind and nature on account of any disability, or on account of death occurring after the change to such more hazardous occupation. Provided, however, that in event of any change to a business, occupation, or vocation, which is not more hazardous than the occupation under which such member was originally accepted into membership, and which business, occupation, or vocation, is accepted and covered by the association, the indemnity to be paid for any disability shall in no event be greater than the weekly earnings of such claimant member under such changed occupation, nor in any event shall indemnity be paid in excess of the schedule governing and applying to such paprticular dis-
252 ability and claim, and as fully described and set forth in articles five, six, seven, and eight of these By-Laws. Ordinary duties about the member's residence shall not be deemed as a change of occupation.

Sec. 7. Every member of this association shall use his influence to further the interests thereof. He shall furnish the Secretary of the association with his address and shall notify him of every permanent change of the same. He shall also furnish notice of every and all additional insurance acquired by him after joining this association.

Sec. 8. The Board of Directors may order an assessment not to exceed the sum or sums specified in the article or articles under which the member is entitled to protection. Such assessment may be made at any time upon

each member for the purpose of raising funds when necessary in the course of the business of the association and 253
for the purpose of carrying out its aims.

Sec. 9. The annual dues of this association shall be $1.00, which shall be due and payable in December, of each year, and may, at the option of the Board of Directors, become due at the same time when the last assessment is paid prior to the annual meeting of this association. Any member failing to pay his dues within thirty days after due notice, shall forfeit his membership and all benefits and privileges herein. Due notice of an assessment shall be deemed to have been given when such notice shall have been addressed to his last known address and mailed at the post office in Minneapolis, Minnesota.

Sec. 10. Each member shall within thirty days from 254
the date of the notice of any assessment mailed to him, pay or cause to be paid, to the association, the amount named in said notice. Any member who shall not pay the amount of any assessment within said period shall thereby be suspended and the association shall not be liable to him or his beneficiaries for indemnity on account of sickness, accident or death, originating during such suspension. Any member so suspended may, subject to the approval of the Board of Directors, become reinstated to membership by paying the assessment which shall be current at the time of application for reinstatement. But such reinstatement to membership shall only extend to cover disability on account of accidental injury thereafter sustained, and disability on account of such sickness as 255
may begin more than ten days after the date of such reinstatement. Provided further, that the association, at the option of the Board of Directors, may require of said delinquent and suspended member that he furnish a Good Health Certificate on an adopted form to be supplied him from the home office.

ARTICLE III.

Election of Officers.

Section 1. The officers of the association shall consist of a President, Vice President, Secretary-Treasurer, Medical Director and a Board of seven Dierctors; which Board shall include the officers first and above mentioned. In this Board the management and control of the business and affairs of the association shall be vested.

296 Sec. 2. The Board of Directors and the Secretary-Treasurer shall be elected by ballot from the members of the association at the annual meetings and they shall hold office for three years and until their successors are elected and qualified. The other officers shall be elected by the Board of Directors from their own number immediately after the close of the annual meeting and they shall hold office for one year and until their successors are elected and qualified.

Sec. 3. Three directors shall constitute a quorum for the transaction of business at any meeting of the Board, regular or special.

Sec. 4. The annual meeting of the association shall be held on the first Saturday after the first Friday of
257 January, each year at 2 o'clock in the afternoon at the home office of the association in Minneapolis, Minnesota.

Sec. 5. All nominations of candidates for the office of director and secretary-treasurer shall be made in writing and filed with the secretary-treasurer at the office of the association not less than thirty days before the date of the annual meeting. No member shall be voted upon for the office of director or Secretary-Treasurer except such as shall be named in the manner hereinbefore specified, except in the event that all members present at the annual meeting consent to nominations being made at that time.

Sec. 6. In case of the resignation, death or disability of any member of the Board of Directors, said board shall fill such vacancy by ballot, electing one of the mem-
258 bers of the association, and the member so elected shall serve for the unexpired term of the retired or deceased director.

Sec. 7. Any member may vote by proxy at any annual or special meeting, but proxy must be in such form as shall be prescribed by the Board of Directors, and must be filed with the Secretary-Treasurer at least ten days prior to the date of such meeting.

ARTICLE IV.

Duties of Officers.

Section 1. It shall be the duty of the President to preside at the meetings of this association and the Board of Directors. He shall perform such other duties as shall devolve upon him by law or as shall be required of him by the Board of Directors.

Sec. 2. The President shall also and at least within thirty days after his election appoint three members of 259
the association (not officers) who shall constitute an examining finance committee, and who shall examine the books, accounts, vouchers of the Secretary-Treasurer of the association and report the condition of the same at the next annual meeting.

Sec. 3. In the absence of the President, it shall be the duty of the Vice President to perform the duties belonging to the office of the President.

Sec. 4. The Secretary-Treasurer shall keep all the records of the association and attend to all the duties pertaining to that office or such thereof as may be required of him by the Board of Directors. He shall collect and receive all assessments from the members of the associa- 260
tion and shall be the custodian of the funds of the association and shall pay out money only under the direction of the Board of Directors and on orders duly signed by the President. He shall at each meeting of the Board of Directors, or at any other time when required by said Board, make a full report of all receipts and expenditures and of the financial condition of the association. He shall at each annual meeting of this association submit and read to the members a full, true and specific report of all receipts and expenditures of the preceding year since the last annual meeting. He shall give a bond for the faithful performance of his duties in such sum and with such sureties as the Board of Directors may from time to time require, but his bond shall not be in a sum less than $5,- 261
000, and shall in all respects be good and sufficient, and subject to the approval of the Board of Directors.

Sec. 5. The duties of the Medical Director shall be to pass upon such applications for membership and claims for indemnity as may be submitted to him by the Board of Directors.

Sec. 6. It shall be the duty of the Board of Directors to take general supervision of the business, including the books, accounts, properties and moneys of the association. They shall have power to cancel the membership of any member under any one or all forms of protection furnished by the association, to suspend or expel any member for any cause which they may deem just and proper and shall in such event notify the member by mail-

262 ing to his last known post office address notice of such action and with such notice a check for all unearned assessments standing to his credit on the books of this association. This shall terminate his membership. The only limitation upon this power to suspend or expel being that in no event shall such cancellation, suspension or expulsion work a forfeiture of any legal rights which may have accrued to the member at the time of such suspension or expulsion.

It shall be their duty to decide and pass on all proofs of disability or death; order assessments for indemnities and operating expenses; approve all expenditures or disbursements of the funds of the association (except as may be directly ordered by the association at a regular
263 meeting) and audit all bills. They shall perform such other duties as may be required of them by the association, and shall make a report of their actions and proceedings to the association at each annual meeting and at such other times as the members of the association may by proper proceedings require.

Sec. 7. The Secretary-Treasurer shall, when required so to do by the examining committee, submit to said committee for their examination and approval all books, papers, accounts, vouchers, and a sworn statement of the condition of the association and of the funds on hand and upon deposit or in his custody as such Secretary-Treasurer. He shall upon the expiration of his term of office make and deliver such report to his successor in
264 office, together with all of the properties and assets of the association in his hands, taking the receipt of his successor therefor.

Sec. 8. The Secretary-Treasurer shall devote his entire time to the duties of his office, and shall receive as his compensation the sum of eighteen hundred dollars ($1,800) per year, in addition to three per cent of the gross income. It being understood that settlement shall be made as on the date of the annual meeting of the members. Provided that the Board of Directors may authorize the payment of such sums to the secretary-treasurer from month to month, as in their judgment may be just and proper.

Provided further, that any such sums so advanced shall be a lien on the compensation herein provided, and shall

be deducted at the annual settlement.

The President and Medical Director shall receive such 265
compensation for their services as the Board of Directors may from time to time allow. The Board of Directors shall receive such compensation for their services as shall be fixed by vote of the members in annual meeting.

ARTICLE V.

Benefits for Disabling Sickness.

Section 1. Each and every applicant not under 18 nor over 55 years of age desiring to share in the benefits as provided for in this article must so designate in his application for membership and must pay such assessment as may be levied by the association from time to time for the purpoes of carrying out the object of this article. Such assessments shall not be less than $2.00 nor more 266
than $3.00, and not more than one assessment shall be levied at any one time. Failure on the part of any such member to pay such assessments as may be levied by the association for the purpose of carrying out the object of this article shall work a forfeiture of all benefits under these by-laws, and his membership in the association shall thereupon lapse and become void, and all moneys previously paid to the association by such member shall be forfeited to the association as liquidated damages.

Sec. 2. Any member in good standing in this association, who shall by virtue of his application for membership herein and the certificate issued thereon, be entitled to indemnity under this article, shall receive weekly indemnity as provided for in Sections 2 and 3 of this Arti- 267
cle (except as provided in Article 6, Sections 1 and 2) during such time as he is wholly, continuously and necessarily confined within his house, because of sickness, and is treated therein at least once a week by a licensed physician, provided such sickness was not contracted prior to or within thirty days of the date of the certificate of membership as follows: For the first week, $10.00; for each week thereafter not exceeding 104 consecutive weeks, $25.00, the liability to begin with the first medical attendance and cease with the last medical attendance.

Sec. 3. For such sickness which does not wholly or necessarily confine the member within his house but which prevents him absolutely from performing any and all duties pertaining to any occupation and during which time

he is under the care and attention of a licensed physician, he shall be entitled to receive $10.00 for each week not exceeding 10 consecutive weeks. In no event shall the association be liable to any member for a period longer than 105 consecutive weeks in one sickness, including the time of confining and the time of non-confining sickness.

ARTICLE VI.

Conditions and Restrictions.

Section 1. Indemnity on account of tuberculosis, paralysis, kidney trouble, heart trouble, rheumatism, sciatica, lumbago, cataracts, blindness, cancer, or sarcoma, neuritis, Bright's disease, hemmorrhoids, fistula, or any chronic condition (except hernia, surgical operations for chronic ailments and venereal diseases), provided such sicknesses or diseases were not contracted prior to or within twelve months of the date of the certificate of membership, shall be paid for, such time as the member is necessarily, wholly and continuously confined to his house or hospital, and attended therein at least once a week by a licensed physician, not exceeding eleven consecutive weeks, as follows:

For the first week of confinement	$5.00
For the second week of confinement	10.00
For each week of confinement thereafter not exceeding nine consecutive weeks	15.00

Provided that if any of the sicknesses here mentioned shall not necessarily confine the member to his house, but nevertheless cause total disability from performing any and all duties pertaining to any occupation and require regular attendance of a licensed physician, then the association shall pay such member at the rate of one-half of the schedule specified above in this article. Provided further that not more than one claim on account of any of the diseases or conditions mentioned in this article shall be paid during any one year to any one member.

Sec. 2. This association shall not be liable under this article for disability due directly or indirectly, wholly or in part to any of the following diseases, or causes: Hernia, venereal diseases, surgical operations for chronic ailments, or for any ailments, affections or complications of the genital organs, neurasthenia, meloncholia, nervous prostration, rundown condition requiring rest rather than medication, diseases of the brain, mental infirmity, de-

mentia and insanity, nor for any disease the cause of which existed or was contracted prior to or within 271
thirty days of the date of the certificate of membership, nor for any disability caused or induced by external, violent and accidental means, or by the excessive use of intoxicating liquors, narcotics or other drugs, or attempt to commit suicide whether sane or insane.

ARTICLE VII.

Benefits for Accidental Injury.

Section 1. Each and every applicant not under 18 nor over 60 years of age desiring to share in the benefits as provided for in this article must so designate in his application for membership and must pay such assessments as may be levied by the association from time to time for the purpose of carrying out the object of this article. Such 272
assessments shall not be more than $2.00 and not more than one assessment shall be levied at any one time. Failure on the part of any such member to pay such assessments as may be levied by the association for the purpose of carrying out the object of this article, shall work a forfeiture of all benefits under these by-laws and his membership in the associaton shall thereupon lapse and become void and all moneys previously paid to the association by such member shall be forfeited to the association as liquidated damages.

Sec. 2. Any member of this association, in good standing, who shall by virtue of his application for membership in this association and the certificate of membership issued thereon, be entitled to indemnity under this 273
article, shall receive benefits as follows: For disability due to external, violent and accidental means of which there shall be external and visible evidence and which shall, indpendently of all other causes, immediately, wholly and continuously disable him from performing any duty pertaining to any occupation, he shall be paid at the rate of $25.00 a week for such loss of time not exceeding 104 consecutive weeks, liability to begin with first medical attendance and to cease with last medical attendance (except as provided in section 5 of this article.) Provided that in case of hernia, due solely to accidental means, and which shall cause total disability, the association shall in no event be liable for a sum greater than $50.00, computed at the schedule rate of $25.00 a week.

Microcard Editions

An Indian Head Company

A Division of Information Handling Services

CARD 2

274 Nor shall the association be liable for more than $50.00 in case such hernia, accidentally sustained, shall result in death. Any member entitled to indemnity under this article for total disability who shall continue to be partially disabled after such total disability and after his right to indemnity for such total disability shall have ceased, shall be entitled to receive indemnity for such partial loss of time incurred by such continued partial disability in the sum of $12.50 per week for not exceeding six weeks, provided that due proof of such partial disability is furnished within ten days after such partial disability has ceased; or, if such partial disability continue for a period longer than six weeks, within ten days after the expiration of such six weeks.

275 Provided further, that in event of totally disabling injury (hernia excepted) sustained by a member while riding as a passenger in the enclosed part of a passenger train (not freight or mixed train), propelled by steam (or electricity at railroad terminals only) and occurring on account and in consequence of an accident or a mishap happening to such passenger coach and train, then and in all such cases, the member shall be paid at the rate of $50.00 a week for a period not exceeding twenty-six weeks of such totally disabling injury. But for any period of total disability continuing after said period of twenty-six weeks, indemnity shall be paid at the rate of $25.00 per week, and indemnity for partial disability following such total disability shall be paid at the rate of
276 $12.50 per week for six weeks, but the combined period of total and partial disability for which the Association is liable shall not exceed 104 weeks.

Sec. 3. Provided further that in case of injury, abrasion, bruise, or laceration, accidentally sustained, which, at the time of happening, does not immediately cause total disability, but which shall result in total disability at a date later than the happening thereof, or where such injury, abrasion, bruise, or laceration develops into septic infection, or blood-poison, causing total disability, then, and in all such cases, there shall be paid to such member for and during the time of total disability, a weekly benefit of $12.50 for 12 consecutive weeks. But no indemnity shall accrue under this Section for partial disability.

Provided further that in event of septic infection, or

blood-poison, following any injury, abrasion, bruise, or laceration, which shall, within ninety days, result in death of the member, there shall be paid to the beneficiary of such member, or his heirs, or assigns, the sum of $500.00, as full indemnity for such loss of time and life. Or, if such septic infection, or blood-poison, incurred as hereinbefore stated, shall, within ninety days from beginning thereof, result in any of the following specific losses, then, and in all such cases, there shall be paid to such member specific indemnities as follows: For loss of both eyes, $500.00. For loss of both hands, or both feet, at or above wrist or ankle joints, $500.00. For loss of one hand and one foot at or above wrist or ankle joints, $500.00. For loss of one eye, $250.00. For loss of one foot, or one hand, at or above wrist or ankle joints, $250.00. 277 278

Sec. 4. Provided further, that where a member sustains injury while temporarily and incidentally engaged in mechanical, construction and expert work, and where such duties are necessary in connection with the occupation under which he was accepted into membership, and which injury shall result in total disability, or in specific losses, or in death, the weekly indemnity, specific indemnity for specific loss, and accidental death indemnities to be paid shall be limited to the respective amounts stipulated in Section 3 of this Article.

Sec. 5. Any member of this association in good standing who shall by virtue of his application for membership in this association and the certificate of membership issued thereon, be entitled to indemnity under this article and who shall sustain any of the following specific losses which shall result from bodily injuries as described in Section 2, this Article, within ninety days from date of accident, shall be paid (in case of death his beneficiary or assigns), less any and all sums previously paid to said member as indemnity on account of said accident, indemnity as follows: 279

For Loss of	
Life (payable to beneficiary)	$5,000.00
Both hands (by severance at or above wrist joint)	5,000.00
Both feet (by severance at or above ankle joint)	5,000.00
One hand and one foot (by severance at or above said	

joints) 5,000.00
Entire sight of both eyes (if irrecoverably lost)
..... 5,000.00
Either hand (by severance above wrist joint) .. 2,500.00
Either foot (by severance above ankle joint) 2,500.00
Entire sight of one eye (if irrecoverably lost) .. 1,250.00

Sec. 6. This association shall not be liable under this article to any member for any indemnity or benefits for injuries or death, or loss of limb or of vision of eye resulting from an accident to a member, where such injury happens while such member is violating any law, or is unnecessarily exposing himself to danger, or is not in the exercise of due diligence for his self protection, or is in any degree under the influence of intoxicating liquors or narcotics, or which shall happen on account of and by reason of, or in consequence of the use thereof, nor for the death of a member occurring through the taking or inhaling of gas voluntarily or otherwise, nor where an autopsy on the body of the deceased member is demanded by the association and refused or denied by the beneficiary, or those claiming under the certificate of membership of said deceased member; or in case of disability or death where such disability or death occur wholly or partially, directly or indirectly in consequence of any of the following causes, conditions or acts or while the injured member was under the influence of or affected by any causes, conditions or acts, to-wit: Disease, bodily or mental infirmity, orchitis, fits, vertigo, sleep-walking, medical or surgical treatment, intentional or unintentional taking of poison, voluntary or involuntary taking of gas, contact with poisonous ivy or other poisonous substance; or blood poison in any form, except as provided for in section 3, this article; injury inflicted by the member on himself, while sane or insane; nor for any injury where there is no external, visible mark or evidence on the body of the member, nor for intentional injuries inflicted on the member by others (unless for the sole purpose of burglary or robbery), over-exertion, wrestling, fighting, automobile and horse racing and professional ball playing; and the association shall not be liable to any person on account of any member who may or shall be injured while acting as soldier or sailor; nor shall this association be liable to any person on account of disability or

death of any member resulting from the discharge of fire arms where there is no witness to the discharge of such 283
fire arms, except the member himself, and in all cases of disability or death resulting from the discharge of fire arms, the burden of proof in establishing the presence of an eye witness shall be upon the member or person or persons claiming indemnity.

ARTICLE VIII.

Specific Benefit for Fatal Sickness or Injury.

Section 1. Each and every applicant not under 18 years, nor over 50 years of age desiring to carry the protection provided under this article must so designate in his application for membership and pay a membership fee of $2.00 and must pay such other assessments as may be levied by the association from time to time for the pur- 284
pose of carrying out the object of this article. Such assessements shall be in amount of not more than $1.00 and not more than one assessment shall be levied at any one time. Failure on the part of any such member to pay such assessment as may be levied by the association for the purpose of carrying out the object of this article shall work a forfeiture of all benefits under these by-laws and his membership shall thereupon lapse and become void, and all moneys previously paid by such member shall be forfeited to the association as liquidated damages.

Sec. II. In event of either accident or sickness sustained or contracted after thirty days of the date of membership herein, and while the member is in good standing, and such sickness or accident shall result in the 285
death of such member, there shall be paid to the beneficiary of such member, or in case of the death of the beneficiary, then to his legal representatives, heirs and assigns, for loss of time due to either such sickness or accident, provided such sickness or accident result in the death of such member, and not otherwise, the following specific benefits as additions to any other benefits which the member may be entitled to receive under such certificate, to-wit:

1st. If death occurs to such member on account of sickness or accident originating or caused after thirty days of the date of the certificate of membership under this form of protection and within ninety days of the date thereof shall be paid for the period of loss of time

286 immediately preceding the death of the member the sum of $50.00. 2nd. If death occurs after ninety days of continuous membership, and within six months of the date of the certificate of membership, under this form of protection there shall be paid for the period of loss of time immediately preceding the death of the member the sum of $100. 3d. If death occurs after six months of continuous membership and within nine months of the date of certificate of membership, under this form of protection there shall be paid for the period of loss of time immediately preceding the death of the member the sum of $150.00. 4th. If death occurs after nine months, of continuous membership, and within twelve months of the date of the certificate of membership, under this form of
287 protection there shall be paid for the period of loss of time immediately preceding the death of the member the sum of $200.00. 5th. If death occurs after twelve months of continuous membership from the date of the certificate of membership, under this form of protection there shall be paid for the period of loss of time immediately preceding the death of the member the sum of $400.00. Provided that the association shall not be liable for any specific benefit named in this Article unless the notice of the death of the member shall have been received within twenty days from the date of said death, and the beneficiaries, legal representatives, administrators, heirs or assigns, shall within sixty days from the date of said death furnish the association with such proofs of the death and
288 the cause of said death as the association may require. Any specific benefits due or payable under this Article shall be paid as provided in Article 10, Section 2, of these by-laws.

ARTICLE IX.

Additional Protection and Limitation of Legal Action.

Section 1. Any member desiring to participate in any of the benefits provided by the association, which his application for membership and certificate of membership do not provide for, may obtain such additional protection by signing a certificate of good health, on a form prescribed by the association for that purpose, and by paying the membership fee and the assessments required by the association for such additional protection and benefit, according to the article and section of these by-laws, gov-

erning such increased protection and additional benefit. 289
Provided that such application for increased protection may be declined, or granted, subject to the discretion of the Board of Directors.

Sec. 2. In every instance where the Board of Directors grant a member the right to participate in protection provided by the association, which is not granted under the member's original application for membership, the assessments to be paid by such member thereafter shall be those stipulated in the respective article or articles providing for such protection. Failure on the part of such member to pay such assessments shall work a forfeiture to all rights and all privileges in the association, and his membership shall thereupon cease. Such member may become reinstated subject to the provisions of Article II, Section 290
10.

Sec. 3. No action at law or in equity shall be brought against this association until three months after the date of filing final proof of disability or death, nor shall the same be brought at all unless commenced within one year after right of action accrues in accord with this section. Immediately upon the expiration of said period of one year after right of action accrues, all liability of this association to the member to whom said accident, sickness or death occurred, or to his beneficiary, or to his heirs, executors or administrator, or to any of them, for indemnity or benefits shall cease.

Sec. 4. No officer, agent or member of this association 291
shall have power or authority to, in any manner, waive any of the provisions of this article, except as hereinbefore provided.

ARTICLE X.

CLAIMS.

Section 1. No claim for indemnity, against the association shall be valid, and the association shall in no event be liable to any member, his beneficiaries, or legal representatives, unless such member, his beneficiaries, or legal representatives, give written notice to the Secretary of the association within ten days, if it be a case of disabling sickness, and within twenty days if it be a case of disabling injury (unless such notice is not reasonably possible) and unless such member, his beneficiaries or legal representatives shall at any time during the continuance of

disability within ten days of the request of the Secretary
292 furnish such further proofs and statements in such form as may be required by the association, and shall furnish or cause to be furnished to the Secretary of the association a full report by the attending physician of his condition once in every thirty days, and keep the home office informed of his address and whereabouts; and unless such member, his beneficiary or legal representative, shall, within thirty days from the termination of disability, furnish the association with such affirmative and final proof of disability in writing, duly verified, as may be required by the association. Failure to furnish such notice, proofs and statement shall cause a forfeiture of all rights to benefits, and the association shall, upon such failure,
293 be released from any and all liability.

Sec. 2. In event of liability on account of the death of a member the indemnity shall be paid to the beneficiary named in the application for membership, which beneficiary must, in all cases, be a relative of such member, or a dependent and, in the event of the death of said beneficiary, then to the executor or administrator of the estate of said deceased member. Provided that such proofs as the association may require as to the death shall be placed in the possession of the Secretary of the association within thirty days after the date of said death, and failure on the part of the beneficiary, executor or administrator to supply such proofs as herein required, shall work a forfeiture of any claim for benefits which might
294 otherwise be due and payable.

Sec. 3. It is expressly understood and agreed that the association may cause all proper investigation to be made touching any sickness, accident or death contracted or sustained by any member for which a claim has been made, including medical and post mortem examinations.

Sec. 4. It is expressly understood and agreed that the liability of this association shall begin on the date upon which the attending physician makes his first professional call upon the member for such disability, and shall cease upon the last professional call, and in no event shall the member be entitled to indemnity for any time prior to such first professional call of such physician, nor after the date of such last professional call.

Examination.

Sec. 5. Each member hereby waives his legal right to 295
object upon the ground of confidential communication or information, to the admission of any testimony sought to be elicited from any physician and it is hereby expressly agreed that any physician having knowledge of any facts pertaining to any claim may testify as fully and freely upon any trial and before a board of arbitration as any other witness. If at any time any question or difference shall arise between this association and a member, or his beneficiary, his representatives, heirs or assigns, respecting the validity of any claim, adjustment of any loss or auditing of any claim under these by-laws, it shall be submitted to a commission of arbitration, consisting of three registered physicians in good standing, to consist of 296
the association's physician, the claimant's physician, and a third physician, to be selected by these two. The decision of said Commission of Arbitration shall in all cases be final. This agreement to arbitrate shall be and is a condition precedent to any suit or proceedings at law and no suit or proceedings at law shall be maintained except to enforce the award of such commission of arbitration, unless the right to arbitrate is expressly waived, in writing, by the association.

Sec. 6. It is expressly understood and agreed between every member and this association that no valid claim against the association for death or disability shall be due and payable until ninety days after the date of the receipt of final and satisfactory proofs of such death or 297
disability.

ARTICLE XI.

Misrepresentation, Etc.

Section 1. Falsehood, misrepresentation, prevarication, fraud or concealment, by or on the part of the member, or by any other person through his procurement or arrangement, or by his beneficiary or representative, in order to obtain any benefit by reason of his membership, or any failure to comply with the requirements of the by-laws of the association, shall render void any certificate of memberhsip and defeat any claims thereunder, and all such cases shall be decided by the Board of Directors.

298

ARTICLE XII.

MEETINGS.

Section 1. The regular annual meetings of this association shall be held upon the first Saturday after the first Friday in January, in the city of Minneapolis, Minnesota, and all special meetings that may be called as provided for in these by-laws shall be held in said city.

Sec. 2. The Board of Directors shall hold meetings at such times as they may determine and as often as a prudent and conservative administration of the affairs of the association shall require, but they shall meet not less than once in three months.

Sec. 3. The Board of Directors may call a special meeting of the association at any time upon the application
299 tion in writing of twenty-five members of the association, which application in writing shall set forth the reason of the call and the business to be brought before the meeting, and at such meeting no proposition shall be entertained or business transacted except as relates to that mentioned in the call.

Sec. 4. The association in regular or special session may make such rules for its government and the transaction of business not inconsistent with these by-laws as it may deem proper and necessary, provided that no rules shall be adopted except by a two-thirds vote of the members present.

Sec. 5. The Board of Directors may make such rules for their government and the transaction of their busi-
300 ness not inconsistent with these by-laws, as they may deem necessary and best.

Sec. 6. Fifty members in person or by proxy shall constitute a quorum at any meeting of the association.

Sec. 7. Every rule that may be adopted by the association shall remain in force until abrogated or suspended by a two-thirds vote of the members present.

ARTICLE XIII.

EXECUTIVE COMMITTEE.

Section 1. The Board of Directors may appoint an executive committee, consisting of three persons selected from among their own number with authority to pass upon all applications for membership, investigate all bills against the association and claims for indemnity and to

direct payment of such bills as in their judgment may be deemed just and proper. 301

ARTICLE XIV.

Funds.

Section 1. The funds of this association shall be derived from membership fees and assessments and the same shall be used only for the purpose of paying benefits as provided in these by-laws and for the payment of the legitimate expenses of the Association.

Sec. 2. A reserve fund for the protection of members and to insure the prompt payment of claims shall be established by setting aside ten per cent of all assessment receipts until such fund shall have reached the sum of twenty-five thousand dollars as required by state law. The remaining ninety per cent of each assessment shall go into a general fund out of which shall be paid: 302

First: Indemnities and.

Second: Operating expenses not to exceed 40 per cent of assessment receipts.

The reserve fund shall not be encroached upon until all the money in the general fund has been exhausted, and then only for the purposes of paying indemnities.

ARTICLE XV.

Section 1. These by-laws may be revised or amended at any regular meeting of the association by a two-thirds vote of the members present, provided that such proposed revision or amendment thereto be filed in writing with the Secretary-Treasurer not less than thirty days prior to said meeting, the proposed amendment to be mailed immediately thereafter to each member in good standing, and by unanimous consent without such notice. 303

Sec. 2. The rights and privileges of each member shall be subject to such changes as may be made in these by-laws from time to time.

IMPORTANT NOTES.

If you are disabled by sickness you must notify the Secretary-Treasurer within ten days.

If you are disabled by injury you must notify the Secretary-Treasurer within twenty days.

All claims must be verified by a regular licensed physician. Liability of the association to any member does not begin until the first call of the attending physician.

Money sent by mail is at the risk of the sender.

304 IT IS IMPORTANT that you notify the Secretary-Treasurer upon making any change in your occupation or address.

INDEX.

DEFENDANT'S EXHIBIT "5."

Advertising Circular of Defendant entitled "The Advantage of Mutual Plan Health and Accident Insurance", including a statement that Defendant does not employ agents.

DEFENDANT'S EXHIBIT "6."

Advertising Circular announcing a prize contest, offering and describing three prizes, (a Gladstone bag, a bill fold and a cartridge pencil), each of which has engraved on it certain advertising matter, to be awarded to the members, sending in "the greatest number of acceptable applications" during September and October, 1910, and containing the statement that "We employ no agents." 307

(Title of Cause).

STIPULATION FOR SETTLEMENT OF CASE.

It is hereby stipulated that the foregoing proposed case, consisting of 62 pages of typewritten matter and 20 Exhibits, may be taken as conformable to the truth and as containing all the evidence offered and introduced on the trial of this cause and all objections, rulings, orders and other proceedings of such trial, and that the same may be settled and allowed as the settled case herein by the Honorable E. F. Waite, without notce. 308

Dated October 28th, 1920.

A. A. TENNER,
Minneapolis, Minnesota.
J. H. MACDONALD,
Kalispell, Montana,
Attorneys for Plaintiff.
LANCASTER SIMPSON
JUNELL & DORSEY,
Attorneys for Defendant.
Minneapolis, Minnesota. 309

CERTIFICATE OF JUDGE TO CASE.

I hereby certify that the foregoing case, consisting of 62 pages of typewritten matter and 20 Exhibits, has been examined by me and found conformable to the truth and to contain all the evidence offered or introduced on the trial of this cause, and also all objections, rulings, orders and all other proceedings of such trial, and I hereby settle and allow the same as the settled case herein.

Dated October 28, 1920.

E. F. WAITE,
Judge.

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310 (Title of Cause.)

FINDINGS.

The above entitled action came duly on before the undersigned, one of the judges of said court, for a trial without a jury, on the 3rd day of February, 1920. Messrs. A. A. Tenner and J. H. McDonald appeared for plaintiff and Messrs. Rieke and Hamrum and Lancaster, Simpson, Junell and Dorsey appeared for defendant.

And the court, having heard and duly considered the evidence adduced on behalf of the parties, makes the following

FINDINGS OF FACT.

1. That the allegations of fact contained in the amend-
311 ed complaint herein are true except in the following particulars:

(a) The action referred to in the second paragraph of said complaint was not begun on the 17th day of May, 1916, but prior thereto.

(b) Service of summons in the last mentioned action was not made on the Secretary of State of Montana on the 17th of May, 1916, but on the 11th of March, 1916.

(c) Such service was not made on the Commissioner of Insurance of Montana on the 17th day of May, 1916, but on the 13th of March, 1916.

(d) The evidence does not show that the summons and complaint in said last mentioned action were ever sent to or received by defendant as alleged in the complaint
312 herein, and the court therefore finds that they were not so sent or received.

2. That on the 6th day of November, 1908, and at all times thereafter until and including the 13th day of March, 1916, defendant was a corporation duly organized under the laws of Minnesota and was engaged in the business of health and accident insurance on a mutual plan and transacted such business in the state of Montana.

And the court further finds as its

CONCLUSIONS OF LAW.

That plaintiff is entitled to recover of defendant the sum of $6,545.90, together with interest thereon at the rate of eight per cent. per annum since the 24th day of October,

1917, and the costs and disbursements of this action. 313
Let judgment be entered accordingly.
Dated June 1, 1920.

By the Court,

E. F. WAITE,
Judge.

Stay of 20 days.

MEMORANDUM.

I think this case is controlled by Wold v. Minnesota Commercial Men's Association, 136 Minn. 380.

(Title of Cause).

BILL OF COSTS AND DISBURSEMENTS.

Amount of Judgment or Verdict. 314

Amount of Judgment	$6,545.90
Interest on same from the 24th day of October 1917, at the rate of eight (8) per cent per annum by Order of Court	$1,396.44
Costs and Disbursements	$7,942.34
Statutory Costs,	$10.00
.....Affidavits,	
.....Acknowledgments,	
Sheriff's Fees,	$ 1.16
Jury Fees,	$ 1.00
Clerk's Fees (to be taxed),	$ 3.00
The above Bill of Costs and Disbursements taxed and allowed at	$15.16 315
Total Amount	$7,957.50

Dated July 1, 1920.

P. S. NEILSON, Clerk.
G. J. MANGAN, Deputy.

(Affidavit of Disbursements and Notice of Taxation of Costs, in usual Form).

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316 (Title of Cause).

JUDGMENT

July 1, 1920.

Judgment—trial on findings. 168471

The above entitled action having been regularly placed upon the calendar of the above named court for the September, A. D. 1919 General Term thereof, came on for trial before the Court on the 3rd day of February, A. D. 1920, and the Court, after hearing the evidence adduced at said trial and being fully advised in the premises, did, on the 1st day of June, A. D. 1920, duly make and file its findings and order for judgment herein.

Now, pursuant to said order and on motion of Messrs. A. A. Tenner and T. H. MacDonald, Attorneys for plaintiff,
317 it is hereby adjudged that the plaintiff recover of the defendant the sum of seventy-nine hundred forty-two & 34/100 dollars, the amount ordered and interest to date hereof, together with the sum of fifteen and 16/100 dollars, costs and disbursements as taxed and allowed herein, amounting in the whole to the sum of seventy-nine hundred fifty-seven & 50/100 dollars ($7,957.50).

By the Court,
P. S. NEILSON,
Clerk of District Court.
By GEO. H. HEMPERLEY,
Deputy.

(Title of Cause).

218 NOTICE OF APPEAL.

To J. H. MacDonald, Esq., Kalispell, Montana, and A. A. Tenner, Esq., 502 First National-Soo Line Building, Minneapolis, Minnesota, Attorneys for Plaintiff, and P. S. Neilson, Clerk of District Court of Hennepin County, Minnesota:

Please take notice that the defendant herein appeals to the Supreme Court of Minnesota from the judgment of the District Court for the Fourth Judicial District, and the whole thereof, filed herein on the 1st day of July, 1920.

LANCASTER, SIMPSON, JUNELL & DORSEY,
Attorneys for Defendant,
630 First National-Soo Line Bldg.,
Minneapolis, Minnesota.

Due and Personal Service of the within Notice of Appeal is admitted this 2nd day of November, 1920. 319

A. A. TENNER,
Minneapolis, Minnesota,
J. H. MacDONALD,
Kalispell, Montana,
Atorneys for Plaintiff.
P. S. NEILSON,
Clerk of District Court, Hennepin County.
By GEO. H. HEMPERLEY.

(Title of Cause).

APPEAL BOND.

Know all Men by these Presents, That we, Minnesota Commercial Men's Association, a Minnesota corporation 320 as principal, and Fidelity and Deposit Company of Maryland, a corporation as surety, are bound unto Minnie Mae Benn, as Executrix of the Estate of Robert J. Benn, plaintiff in the above entitled action, in the sum of seven thousand nine hundred seventy-seven and 50/100 ($7,977.50) dollars to the payment of which to the said Minnie Mae Benn, as Executrix of the Estate of Robert J. Benn, her heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our successors and assigns.

The condition of this obligation is such that whereas the defendant in the above entitled action has appealed to the Supreme Court of the State of Minnesota from a judgment and the whole thereof entered in said action on the 1st day of July, 1920 321

Now, Therefore, if the appellant shall pay all costs and charges which may be awarded against him on such appeal not exceeding the sum of two hundred fifty and 00/100 ($250.00) dollars and shall pay the amount directed to be paid by said judgment, if it is affirmed, or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, shall pay all damages which are awarded against the appellant upon such appeal, then this obligation which is given in pursuance of General Statutes 1913, Section 8004, shall be void; otherwise to remain in full force.

322 In Testimony Whereof, We have caused this indenture to be executed by the appropriate corporate officers.

Minnesota Commercial Men's Association,
By SAMUEL N. REEP, Pres.
A. J. ALWIN, Secy.-Treas.
Fidelity and Deposit Company of Maryland.
By D. B. WOOD,
Attorney-in-Fact.
Attest: I. D. Hauck, Agent.
(Seal)

In the presence of:
PAUL CLEMENT,
A. N. RIEKE,
As to Principal
323 M. A. BUTLER,
G. L. PREWITT,
As to Surety.

STATE OF MINNESOTA, }
} ss.
County of Hennepin. }

On this 17th day of November, A. D. 1920, before me, a Notary Public within and for said county, personally appeared Samuel N. Reep and A. J. Alwin to me personally known, who, being by me duly sworn did say that he is the president and secretary-treasurer respectively of Minnesota Commercial Men's Association, the corporation named in the foregoing instrument, and that the seal af-
324 fixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Samuel N. Reep and A. J. Alwin acknowledged said instrument to be the free act and deed of said corporation.

A. V. RIEKE,
(Seal) Notary Public,
Henenpin County, Minnesota.
My commission expires Jan. 2, 1922.

STATE OF MINNESOTA, }
} ss.
County of Hennepin. }

On this 16th day of November, A. D. 1920, before me appeared D. B. Wood and I. D. Hauck, to me personally known, who, being by me duly sworn, did say that they are the Attorney-in-fact and Agent of the Fidelity and Deposit Company of Maryland; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said D. B. Wood and I. D. Hauck acknowledged that they executed said instrument as such Attorney-in-fact and Agent and as the free act and deed of said corporation.

M. A. BUTLER,
(Seal) Notary Public,
Hennepin County, Minnesota.

My commission expires July 22nd, 1925.

I hereby approve the within Bond and the surety thereon.

E. F. WAITE,
Judge of District Court, Fourth Judicial District,
Hennepin County, Minnesota.

Filed Nov. 18, 1920.

This cause having been duly called for hearing in its regular order on the 22nd day of April, 1921. Messrs. Rieke & Hamrum and Messrs. Lancaster, Simpson, Junell & Dorsey appeared on behalf of the defendant-appellant and Messrs. A. A. Tenner and E. E. Tenner appeared on behalf of the plaintiff-respondent.

OPINION.

PER CURIAM.

This case, in all substantial respects, is similar to the case of Wold against this same defendant reported in 136 Minnesota at page 380. That was an action on a judgment redered by a Wisconsin court on a certificate of insurance issued by defendant to a resident of the State

of Wisconsin. Defendant had never appointed an agent in Wisconsin to receive service of process and the service in the Wisconsin action was made on the Insurance Commissioner of that State as authorized by the statute of that State. Defendant contended that it did no business in Wisconsin and that the Wisconsin court acquired no jurisdiction over it by such service. We held that defendant was doing business in Wisconsin, that the Wisconsin court acquired jurisdiction by service on the insurance commissioner, and that its judgment was valid. The present action is brought on a judgment rendered by a Montana court on a certificate of insurance issued by defendant to a resident of the State of Montana. Defendant has never appointed an agent in Montana to receive service of process and the service was made on a State official as authorized by the Montana statute in such cases. Defendant contends that the Montana Court acquired no jurisdiction by this service and that its judgment is void for that reason. Defendant was doing business in Montana of the same nature and in the same manner as in Wisconsin. But defendant insists that the contract of insurance is a Minnesota contract, and that in a suit on such a contract the courts of Montana cannot acquire jurisdiction over it by service on a State official whose only authority to accept such service is derived from a statute of Montana. In support of this contention it cites Old Wayne Life Assn. v. McDonough, 204 U. S. 8, Simon v. Southern Ry. Co., 236 U. S. 115, and other cases, and urges that the federal cases are controlling and that the Wold case is not in accord with them. Even if the contract be a Minnesota contract, it had its inception in the Montana business and involves the rights of a citizen of Montana growing out of the business done in that State, and we think the case does not come within the rule applied in the federal cases cited. Our conclusion is that the Wold case should be followed until the Federal Supreme Court shall pronounce it erroneous.

Judgment affirmed.

AFFIDAVIT OF COSTS AND NOTICE OF TAXATION

Respondent's Costs and Disbursements.

Statutory costs	$25.00
Printing record	$
Printing brief	$38.50
Clerk District Court for making return ($5.00)	$
Clerk Supreme Court for filing return ($10.00)	$
..... Affidavits (25 cents each)	$
Postage and express	$ .50
Transcript of case used only for appeal to Supreme Court, and not used in motion for a new trial	$
Premium on appeal bond	$
.....	$

The above bill of costs and disbursements taxed and allowed June 7, 1921 at $64.00.

HERMAN MUELLER,
(Seal) Clerk Supreme Court of Minnesota.

STATE OF MINNESOTA, } ss.
County of Hennepin. }

A. A. Tenner being first duly sworn, deposes and says, that he is one of the attorneys for the respondent in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements and said respondent in the above entitled proceeding, and that all of the items of such disbursements have been actually and necessarily paid or incurred therein, by and on behalf of said respondent.

A. A. TENNER.

Subscribed and sworn to before me, this 2nd day of June, 1921.

E. J. SHANNON,
Notary Public, Hennepin County, Minn.

(Seal)
My commission expires Aug. 28th, 1926.

SIR: PLEASE TAKE NOTICE. That the costs and disbursements of the respondent in the above entitled action will be taxed by and before Herman Mueller, Clerk of the Su-

preme Court of Minnesota, at his office in the Capitol, at St. Paul, Minnesota, on Tuesday, the 7th day of June, 1921 at 9:30 o'clock in the forenoon of said day and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed on behalf of said respondent and inserted in a judgment in said action that will then and there be entered.

Very respectfully,
A. A. TENNER,
T. H. MacDONALD,
Attorneys for Respondent.

To Lancaster, Simpson, Junell & Dorsey and Rieke & Hamrum, attorneys for Appellant, Minneapolis, Minn.

STIPULATION AND ORDER FOR STAY OF PROCEEDINGS.

WHEREAS, the above entitled court has heretofore filed its decision and order affirming the judgment of the District Court of Hennepin County, and

WHEREAS, it is the purpose and intention of the appellant herein to petition the Supreme Court of the United States for a writ of certiorari to the above entitled court to review the judgment thereof.

Now, therefore, it is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that all proceedings herein including the transmission of the remittitur to the Clerk of the Distrct Court of Hennepin County and excepting only the entry of judgment herein, be and the same hereby are stayed for a period of thirty days (30) from and after the entry of said judgment.

A. A. TENNER and
T. H. MacDONALD,
Attorneys for Plaintiff & Respondent.
RIEKE & HAMRUM and
LANCASTER, SIMPSON,
JUNELL & DORSEY,
Attorneys for Defendant & Appellant.

ORDER.

On reading and filing the foregoing stipulation, it is hereby ordered that all proceedings herein including the transmission of the remittitur to the Clerk of the District Court of Hennepin County and excepting only the entry of judgment herein he and they hereby are stayed for a period of thirty days (30) from and after the entry of judgment herein.

For the Court,
CALVIN L. BROWN,
Chief Justice.

JUDGMENT.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin and and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein the sum and amount of Sixty-four Dollars ($64.00), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 7, A. D. 1921.

By the Court,
Attest: HERMAN MUELLER,
Clerk.

CLERK'S CERTIFICATE.

I, Herman Mueller, Clerk of the Supreme Court of the State of Minnesota, do hereby certify and return to the Honorable, the United States Supreme Court that the foregoing consisting of 115 pages numbered "i" and consecutively from 1 to 114, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment and all other proceedings in said cause, except the full captions, title and endorsements omitted

pursuant to the rules of the Supreme Court of the United State, and of the whole thereof as appears from the original files of said Court:

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Minnesota at St. Paul, Minnesota, this 24 day of June, 1921.

HERMAN MUELLER,
Clerk of the Supreme Court,
(Seal) of the State of Minnesota.

UNITED STATES OF AMERICA, *ss.*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Being informed that there is now pending before you a suit in which Minnesota Commercial Men's Association is appellant, and Minnie Mae Benn, as Executrix of the Estate of Robert J. Benn, is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the District Court, Fourth Judicial District of the State of Minnesota, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed] #22,211. File No. 28,334. Supreme Court of the United States, No. 379, October Term, 1921. Minnesota Commercial Men's Association vs. Minnie Mae Benn, as Executrix, etc. Writ of Certiorari. Supreme Court. Filed Oct. 28, 1921. H. Mueller, Clerk.

Supreme Court of the United States.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION, a Corporation, Appellant,

vs.

MINNIE MAE BENN, as Executrix of the Estate of Robert J. Benn, Respondent.

Stipulation.

A writ of certiorari having been issued on October 22nd, 1921, by the Supreme Court of the United States to the Supreme Court of the State of Minnesota, directing that the record and proceedings in a case entitled Minnie Mae Benn, as Executrix of the Estate of Robert J. Benn, Respondent vs. Minnesota Commercial Men's Association, a Corporation, Appellant, be sent without delay to the Supreme Court of the United States.

It is hereby stipulated by and between the parties hereto, by their respective attorneys that the certified transcript of record now on file

in the Supreme Court of the United States in the above entitled case may and shall be taken as a return to said writ of certiorari and that this stipulation may be filed with the Clerk of the Supreme Court of the State of Minnesota and that said Clerk may certify to copy of same and send such certified copy to the Supreme Court of the United States as his return to said writ of certiorari.

LANCASTER, SIMPSON, JUNELL & DORSEY,
Attorneys for Appellant.
T. H. MACDONALD, *Atty.*,
Kalispell, Montana:
ALPHONSE A. TENNER,
Minneapolis, Minn.:
EDWARD E. TENNER, *Atty.*,
Minneapolis, Minn.,
Attorneys for Respondent.

Minneapolis, Minn., October 28th, 1921.

(Endorsed:) Supreme Court. Filed Oct. 28, 1921. H. Mueller, Clerk.

STATE OF MINNESOTA,
Supreme Court, ss:

I, Herman Mueller, Clerk of the above named Court and Custodian of the records thereof, do hereby certify that I have compared the foregoing paper writing with the original Stipulation now remaining on file in said action, and that the same is a true and correct copy of said original and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the Capitol in the City of St. Paul, Minn., this 3d day of November A. D. 1921.

[Seal of the Supreme Court, State of Minnesota.]

HERMAN MUELLER,
Clerk of Supreme Court,
By —— ——,
Deputy Clerk.

[Endorsed:] 379/28,334.

[Endorsed:] File No. 28,334. Supreme Court U. S., October Term, 1921. Term No. 379. Minnesota Commercial Men's Association, Petitioner, vs. Minnie Mae Benn, as Executrix, etc. Writ of certiorari and return. Filed December 2, 1921.

Endorsed on cover: File No. 28,334. Minnesota Supreme Court. Term No. 379. Minnesota Commercial Men's Association, petitioner, vs. Minnie Mae Benn, as executrix of the estate of Robert J. Benn, deceased. Petition for writ of certiorari and exhibit thereto. Filed June 27th, 1921. File No. 28,334.

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WM. R. ST

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 103.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION,
Petitioner,

vs.

MINNIE MAE BENN, AS EXECUTRIX OF THE ESTATE OF ROBERT J. BENN, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Petitioner's Brief.

A. V. RIEKE,
DAVID F. SIMPSON,
WM. A. LANCASTER,
JOHN JUNELL,
JAMES E. DORSEY,
ROBERT DRISCOLL,
Attorneys for Petitioner,
Minneapolis, Minnesota.

Hayward Brief Company, 513 Fourth Ave. So., Minneapolis

INDEX.

TABLE OF CASES.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 103.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION,
Petitioner,

vs.

MINNIE MAE BENN, AS EXECUTRIX OF THE ESTATE OF ROBERT J. BENN, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Petitioner's Brief.

STATEMENT OF THE CASE.

This case comes before the court pursuant to a writ of certiorari to the Supreme Court of the State of Minnesota to review a decision rendered by that court affirming a judgment entered by the District Court of Hennepin County, Minnesota, in favor of the plaintiff (the respondent) in an action on a default judgment entered against the petitioner and in favor of the respondent in the State of Montana.

THE RESPONDENT is the executrix of the estate of one Robert J. Benn, deceased, who was a member of the defendant Association. It is conceded that the respondent

was duly appointed and duly qualified to sue in Minnesota in her capacity as executrix.

THE DEFENDANT (the petitioner) is a corporation duly organized and existing under the Laws of the State of Minnesota for the object and purpose of giving to its members conservative and reasonable health, accident and specific benefit insurance on a mutual plan at the least possible cost (By-laws, Article 1, Defendant's Exhibit "4," Record, page 82). It operates and conducts its business under and pursuant to Section 3536, General Statutes of Minnesota 1913, as amended by the Laws of Minnesota 1917, Chapter 183. The amendment referred to was not passed until after the transactions involved in this case and the original Section 3536 is set out in full hereinafter at page 19.

THE ORIGINAL ACTION in Montana, which culminated in the judgment sued on in Minnesota, was commenced by the respondent in March, 1916, against the petitioner in the District Court for the Eleventh Judicial District of the State of Montana, in and for the County of Flathead in said state, to recover insurance alleged to be payable to the respondent by virtue of the membership of her deceased husband in the Minnesota Commercial Men's Association.

THE MONTANA COURT in which the action was commenced was and is a court of general common law and equity jurisdiction, duly constituted, established and acting under and by virtue of the Laws of the State of Montana. *The summons and complaint* in the original action were served on the Secretary of State and the Insurance Commissioner of Montana on March 11th and 13th, 1916, respectively, pursuant to an order of the Clerk of the Court in which the action was commenced. *The*

Montana Statutes which it is claimed authorized service in this manner are alleged in the amended complaint and are set out verbatim hereinafter at page 16. The petitioner never received a copy of the summons or complaint from either the Insurance Commissioner or the Secretary of State of Montana. It received *no notice* of the commencement of the action in Montana in any form from the Insurance Commissioner and all the information received by the petitioner from the Secretary of State of Montana is contained in Plaintiff's Exhibits "C" and "D" (Record, pages 77-78). This information is most meager. The first letter (Exhibit "C") contained no information whatever,—not even the name of the plaintiff in the action. The second letter which was received in reply to inquiries by the petitioner contained no information regarding the nature of the cause of action, the amount of damages claimed or the name of the attorney for the plaintiff in the action and did not reach the petitioner until ten days after the purported service of the summons (Record, page 19).

THE PETITIONER APPEARED SPECIALLY by its attorney in the original action in Montana and solely for the purpose of objecting to the jurisdiction of the Montana Court and to that end filed a motion, based on affidavit, that the summons and the service thereof be vacated on the ground that the defendant (the petitioner) was a Minnesota corporation licensed to do business only in Minnesota and carrying on its business exclusively at its home and only office in Minneapolis, Minnesota; that it made no contracts in Montana; that it owned no property in Montana; that it never had any agents in Montana or elsewhere and that it had never done business in Montana; that the service of summons was void and that the Montana Court had no juris-

diction to hear, try or determine the cause of action sued upon (Record, pages 14-20). This *motion to quash* the service of summons was denied by order of the Montana Court on April 27th, 1916. Thereafter the petitioner neither appeared nor answered in the Montana action and on October 24th, 1917, judgment by default was entered against the petitioner for $6,545.90, with interest thereon at the rate of 8% per annum until paid (Record, page 23), that being the rate provided by the Revised Codes of Montana 1907, Section 5214, which is set out verbatim hereinafter at page 19. No part of this default judgment, which was entered by the Montana District Court, has ever been paid and, on October 23rd, 1918, the respondent commenced the present action in the District Court for the Fourth Judicial District of the State of Minnesota, in and for the County of Hennepin, to collect the Montana judgment. An *amended answer* was interposed by the petitioner in the Minnesota action which alleged that the petitioner was a Minnesota corporation and was not doing business in the State of Montana and had never agreed or consented to service of process on either the Insurance Commissioner or the Secretary of State of Montana; that the contract of insurance on which the Montana judgment was based was a Minnesota contract, made, executed and to be performed in Minnesota, and that the Montana judgment was rendered without jurisdiction and was void and that its enforcement would deprive the petitioner of its property without due process of law in contravention of both the Federal and State Constitutions.

THE CASE WAS TRIED in February, 1920, before the Honorable E. F. Waite, one of the judges of the District Court of Hennepin County, Minnesota, without a jury. *The trial court found* that the facts alleged in the amended

complaint were true excepting as regards certain dates which do not have any material bearing on the merits of the questions involved at this time and excepting also the allegation that the summons and complaint in the Montana action were sent to or received by the petitioner, which the court found was not a fact (Record, page 104). With these findings the petitioner has no cause to quarrel, except as hereinafter stated. Indeed, practically all of the facts alleged in the amended complaint regarding the Montana proceedings were admitted by the petitioner at the trial. It was further found as a fact, however, that at all times between November 6th, 1908, the date when the certificate of membership was issued to Robert J. Benn, and March 13th, 1916, the date when the summons and complaint in the Montana action were served on the Secretary of State of Montana, inclusive, the petitioner was transacting the business of health and accident insurance in the State of Montana (Record, page 104). It is to this finding that the petitioner objects. The evidence bearing on this question which was introduced at the trial is hereinafter reviewed in detail and it is the petitioner's contention that there is no evidence to support the finding that the petitioner was doing business in Montana; that the evidence is conclusive of the fact that the petitioner was not doing business in Montana; that the Montana Court in which the judgment sued on was entered had no jurisdiction of the person of the petitioner; that the Montana judgment is therefore null and void and is not entitled to be given full faith and credit; and that to enforce the Montana judgment will deprive the petitioner of its property without due process of law in violation of the United States Constitution.

The trial court further found as a conclusion of law

that the respondent was entitled to judgment against the petitioner. The petitioner takes exception to this finding on the ground that it was not found as a fact that the cause of action arose in Montana and it conclusively appears that it did not; that under such circumstances the Montana Court could not acquire jurisdiction of this cause of action by substituted service of process even if the petitioner were doing business in Montana. This constitutes the second question in the case.

Pursuant to the findings of the trial court judgment was entered against the petitioner in the District Court of Hennepin County, Minnesota, on July 1st, 1920, for $7,957.50 (that being the amount of the Montana judgment, with interest at the rate of 8% per annum from October 24th, 1917, plus $15.16 costs and disbursements).

Attached to the findings of the trial court and its order for judgment was a memorandum stating that the case was controlled by the decision of the Minnesota Supreme Court in *Wold v. Minnesota Commercial Men's Association*, 136 Minn. 380, 162 N. W. 461 (Record, page 105). An appeal was taken from this judgment to the Supreme Court of Minnesota where, in an opinion filed on May 27th, 1921, and reported in 149 Minn. 497 and 182 N. W. 999, the judgment of the trial court was affirmed. The decision of the Minnesota Supreme Court was a *per curiam* decision in which it is stated that

> "Our conclusion is that the Wold case should be followed until the Federal Supreme Court shall pronounce it erroneous" (Record, page 110).

The petitioner immediately filed a petition in this court for a writ of certiorari to review the decision of the Minnesota Supreme Court. The writ was allowed on October 28th, 1921, and the return filed on December 2nd, 1921.

From the above statement it can be readily seen that *the first question* involved is whether or not the trial court erred in finding that the petitioner was doing business in Montana. *The second question* is whether or not the Montana Court had jurisdiction of a cause of action which arose in Minnesota, even if the petitioner was doing business in Montana, where the only service was on the Secretary of State of Montana. *The petitioner also contends* that it was error for the trial court to allow interest on the Montana judgment at the Montana rate rather than at the Minnesota rate. The respondent has injected *a further question* into the case by claiming that, whatever the proper solution of the questions already suggested, the petitioner has estopped itself to question the jurisdiction of the Montana Court by its objection to the jurisdiction of the Montana Court.

Practically all the evidence introduced at the trial was directed to the question of whether the petitioner was doing business in Montana and may be briefly summarized as follows:

A LICENSE or certificate of authority to transact the business of accident and health insurance in the State of Minnesota is issued to the petitioner each year by the Commissioner of Insurance of the State of Minnesota. The license certificate for the year commencing March 1st, 1915, the year in which the original action was commenced in Montana, was introduced in evidence as Defendant's Exhibit "1" (Record, page 81) and a similar license has been issued each year since 1908 (Record, pages 36-37). The petitioner is not and never has been licensed or authorized to do business in any other state or country (Record, page 39).

THE ONLY OFFICE which is or has ever been main-

tained by the petitioner is in Minneapolis, Minnesota, and all its business is transacted at and from this office. *No property* of any kind or character is or has ever been owned by the Association in the State of Montana or in any other state excepting Minnesota (Record, page 43).

MEMBERSHIP in the Association is by its By-laws confined to male white persons engaged in commercial or professional pursuits of a non-hazardous nature and is designed primarily for traveling salesmen, solicitors, buyers and others engaged in similar pursuits (Section 1, Article II of By-laws, Record, page 82). The By-laws provide for the forfeiture of membership in case the member enters an employment which is more hazardous than that named in his application for membership (Record, pages 83, 84). As is intimated in some of the testimony, the fact that Benn's death took place while he was engaged in the occupation of tending bar was one of the principal grounds on which the claim of his widow was not paid by the Association (Record, pages 61, 62). The merits of the case are not, however, before the Court at this time and it is unnecessary to discuss them.

APPLICATIONS FOR MEMBERSHIP in the Association are made on blank forms prescribed and furnished by the petitioner and it is expressly provided by the By-laws, which constitute the contract between the parties, that no person can become a member of the Association until his application has been submitted to, passed upon and accepted by the Board of Directors *at the home and only office* of the Association in Minneapolis, Minnesota, and until a certificate of membership has been issued to him *at that office* (Section 2, Article II, By-laws, Record, page 83). *This is the only method* that is or has ever been used by the Association in accepting new members and

issuing certificates (Record, pages 38, 39). The Association is not concerned with the manner in which applications are received by it. They may either be mailed to it by or on behalf of the applicant or delivered personally to it at its Minneapolis office. As a matter of fact about one-third of the applications are received from the applicant personally at the Minneapolis office and the balance are received by mail (Record, page 49). In whatever manner they reach the Association, all applications are submitted to the Board of Directors *at the Minneapolis office* and, if approved, a certificate of membership is issued and mailed to the applicant at any address indicated by him at the time of the application, which may or may not be his residence. The Association is not concerned with and makes no inquiries regarding the legal residence or domicil of its members. It is interested only in having an address where each member can be reached or from which mail will be forwarded to him (Record, page 55). The certificate itself recites that it is executed by the Association *at its home office* in Minneapolis, Minnesota, and this is without exception the fact (Record, page 11). The contract of insurance therefore is a Minnesota contract and the petitioner enters into *no contracts in any other states.*

Assessments and Dues are all payable *at the Minneapolis office* of the Association in Minneapolis exchange and drafts on members are never drawn by the Association for this or any other purpose (Record, page 43). Assessments are made from time to time by the Board of Directors according to the needs of the Association and notice thereof is mailed *at Minneapolis* to the member at his last known address. Annual dues of $1.00 are collected in the same manner and the By-laws specifically provide that due notice shall be deemed to have been given

when such notice shall have been addressed to the last known address of a member and mailed *at the post office in Minneapolis, Minnesota* (By-laws, Article 2, Sections 8 and 9, Record, pages 84-85).

NEW MEMBERS are procured solely through advertising. Every form of advertising which is deemed productive is employed. Lists of eligible prospects are procured from every source available and these prospects are then appealed to directly through circular letters and other advertising matter forwarded by mail *from the Minneapolis office*. The appeal is based largely on the small cost of this insurance (Record, page 40). The explanation of this low cost as compared to the cost of insurance in any of the old line companies or the larger mutual companies is that *the Association employs no agents* and thereby reduces its operating expenses by at least one-third. This explanation is made and emphasized in practically all the advertising matter used in the attempt to procure new members (Record, page 41). A typical example of these advertising circulars was introduced in evidence as Defendant's Exhibit "5" (Record, page 102).

ADVERTISING THROUGH ITS MEMBERS is resorted to by the Association for the purpose of procuring new members and all members are expected to use their influence to further the interests of the Association (By-laws, Article II, Section 7, Record, page 84). They are urged to and often do send in lists of prospects (Record, page 40). Whenever assessment notices or other communications are sent out to members, blank forms for application are usually enclosed and the member is asked to try to induce his friends or associates to apply for membership. No member, however, is or has ever been given any authority whatever to act for or on behalf of the

Association in any manner. A member cannot accept an application or receive on behalf of the Association the initial premium or any assessment or dues. In short, the members are simply used as an advertising medium for the Association for the purpose of placing its plan before the public. The application blanks provide a space for the recommendation of the applicant by a member. This, however, is not in any way essential to the acceptance of the application. Nor is the recommendation of a member relied upon to any extent whatever in determining the acceptability of the application. The sole purpose of providing for such recommendation is to determine the returns from the various methods of advertising, of which this is one (Record, page 40).

MEMBERS RECEIVE NO COMPENSATION for inducing others to apply for membership. It is to the obvious advantage of every member to increase the membership because the cost of the insurance is directly dependent on the number of members. This fact is constantly placed before the members by circular letters and other advertising matter and is used as the inducement which prompts members to exert themselves in procuring applications.

PREMIUMS OR PRIZES have occasionally been offered to members who induce a certain number of non-members to apply for membership. These premiums or prizes have invariably been in the form of *further advertising matter* such as lapel or identification buttons, never break pencils, memorandum books, grips or grip tags, watches, billfolds, etc., all bearing the insignia or trade-mark of the Association. All these articles are purposely in the nature of traveling men's accessories and of such a character that they will be likely to come under the observation

of traveling companions of the owner. They invariably have the Association's name in a conspicuous place and are quite obviously designed as an advertising medium (Record, pages 41, 47, 54, 58, 103). A typical example of the circular letters in which premiums or prizes of this nature have been offered to the members was introduced in evidence as Plaintiff's Exhibit "A" attached to the depositions (Record, page 80). It is apparent from the most casual reading of this letter that nothing in the nature of an employment or agency is intended or could be understood. *No authority to do any act* on behalf of the Association is suggested. To be sure, members may, if they choose, as a favor to an applicant, mail his application and initial premium to the Association. If they do so, it is as agent of the applicant and not of the Association and it is treated by the Association as the applicant's act. If the application is rejected, the premium is returned directly to the applicant. The acceptance by a member of the initial premium could not bind the Association (Record, pages 49, 57, 58). The members cannot therefore be regarded in any sense as the agents or representatives of the Association.

No Agents or Solicitors are employed by the Association even in Minnesota (Record, pages 39, 68). *The Minnesota Statute* under which the Association is licensed and operates forbids the payment of commissions or other compensation for securing new members and yet for thirteen years the Insurance Commissioner of Minnesota has annually issued to this Association a certificate of authority to carry on its business in the manner herein described. It appears that from time to time the Association receives inquiries asking for the privilege of representing the Association in the capacity of agent or solicitor (Record,

page 42). Defendant's Exhibit "7," a form letter used in answering all such inquiries, was excluded from evidence (Record, pages 42, 43), but the testimony is undisputed that all of such requests are refused.

PAYMENT OF LOSSES by the Association is governed by the same policy as the original issue of the certificate of membership and the collection of assessments and dues. *No act is done by or on behalf of the Association excepting at its home office in the State of Minnesota.* All losses are paid by check on a Minneapolis bank mailed from the Minneapolis office to the member or his beneficiary. All such checks are payable at Minneapolis in Minneapolis exchange. Drafts on the Association to cover losses are frequently presented but never honored (Record, pages 43-44).

PROOF OF LOSS must be made by the member or his beneficiary on forms provided by the Association on request and must be filed with the Association at Minneapolis together with a report by the attending physician (By-laws, Article X, Section 1, Record, pages 97, 98). In case the attending physician does not furnish the requested report or if his report is inadequate or improper the Association procures what information is necessary to determine the validity of the claim through a report from some local physician selected at random from a list of reputable physicians in the particular locality involved (Record, pages 49, 50). *No resident physicians* are employed by the Association except in Minnesota (Record, page 43). *Further investigation*, including medical and post mortem examinations, may be made by or on behalf of the Association under Article X, Section 3 of the By-laws (Record, page 98). There is not, however, any evidence in the Record to show that advantage has ever been

taken of this right either in Montana or any other state.

ADJUSTMENT OF LOSSES is within the sole and exclusive power of the Board of Directors of the Association *in Minneapolis*. In no event is any one else authorized to adjust any losses. Proofs of claims received at Minneapolis are submitted to the Board of Directors which includes one medical director and the reports and statements which the claimant or his beneficiary and the attending physician or some other local physician are required to file are so constructed as to enable the Board of Directors to determine from them whether or not the claim should be allowed (Record, page 43).

ROBERT J. BENN'S APPLICATION for membership in the Association was executed by him on November 2nd, 1908, and is in evidence as Defendant's Exhibit "2" (Record, page 81). It was an application for health insurance only. It was received by the petitioner and accepted by the Board of Directors on November 6th, 1908, and a certificate of membership (Exhibit "A" attached to the complaint in the Montana action, Record, page 11) was issued at Minneapolis the same day and mailed to Benn, addressed to Kalispel, Montana (Record, pages 38, 39). On April 29th, 1911, Benn applied for additional protection, namely, accident insurance, and this application was accepted at Minneapolis on May 3rd, 1911 (Defendant's Exhibit "3," Record, page 81). Assessments and dues were paid by Benn regularly as appears from Plaintiff's Exhibit "E" (Record, page 78) until March 5th, 1915, the date of his death. It does not appear that there was anything unusual or irregular in the proof of claim which was filed or the attending physician's report and there was therefore no report obtained from any other physician. The respondent made a vain attempt to prove that the

Association caused an investigation to be made of the circumstances surrounding Benn's death. The testimony introduced for this purpose in the deposition of A. J. Johnson was wholly incompetent and was therefore stricken out (Record, pages 65, 66). On the other hand, the testimony of Mr. Clement on cross examination stands uncontradicted to the effect that there was no such investigation made by or on behalf of the Association and that all the information which the Association had was in its files and had come to it through the mails without any solicitation on its part, and that the Association had specifically refused to use the adjuster or investigator who was being sent out by another insurance company (Record, pages 52 to 54).

In Brief, it appears affirmatively and beyond all question that the manner in which the petitioner conducted and still conducts its business entails *no act* by or on behalf of it in the State of Montana; that it owns *no property* in that state; that *none of its contracts* are made in that state; that it employs *no agents* in that state, either solicitors, resident physicians, investigators or adjusters, and the Record is wholly devoid of any evidence that the petitioner has ever participated in even so much as a single isolated transaction in Montana. The only conceivable basis on which the Minnesota Courts can have relied in holding that the petitioner was doing business in Montana is the single fact that some of the petitioner's members may temporarily or even permanently reside in Montana and under the decisions of this Court that is not sufficient to constitute the doing of business so as to justify substituted service of process.

MONTANA STATUTES.

Revised Codes Montana 1907, Section 4017.

License Fee—Amount. All insurance corporations, associations and societies, as hereinbefore specified in the preceding section, before commencing to do business in the State of Montana, shall be required to secure a license authorizing them to transact business of insurance corporations, associations or societies, and shall pay to the State Auditor, for such license, the following fees:

For a license to collect in any one year premiums amounting to Five Thousand Dollars or less, One Hundred and Twenty-five Dollars.

For a license to collect in any one year premiums over the sum of Five Thousand Dollars, the sum of Twenty Dollars for each and every One Thousand Dollars to be so collected; provided, that, where any insurance corporation, association or society has fifty per cent of its capital stock invested in Montana securities, such insurance corporation, association or society shall be allowed to deduct whatever tax it may have already paid, from the amount due for such license fee or tax, as herein provided (Section 3 of Chapter 49, Laws of 1915).

Revised Codes of Montana 1907, Section 4062.

Amount of Paid-up Capital—Appointment of Attorney in Fact—Process—Service. It shall not be lawful for any insurance company, association or partnership, organized or associated for any of the purposes specified in this chapter, incorporated by, or organized under the laws of any other state, or the United States, or any foreign government, directly or indirectly, to take risks or transact any business of insurance in this state, unless possessed of two hundred thousand dollars of actual paid-up capital, exclusive of any assets of such company as shall be deposited in any other states or territories, or foreign countries, for the special benefit or security of the in-

sured therein; any such company desiring to transact any such business as aforesaid, by any agent or agents in this state, shall appoint one attorney in fact in each county in which agencies are established, resident of such county, and shall file with the State Auditor a written instrument duly signed and sealed, authorizing such attorney in fact of such company to acknowledge service of process, for and in behalf of such company in the state consenting that such service of process, mesne or final, upon such attorney shall be taken and held as valid as if served upon the company to the laws of this state, or any other territory or state, and waiving all claim of right or error by reason of such acknowledgment or service and also that in case of death, absence, or if for any other cause, service of process cannot be made upon the attorney so appointed, service of process may be made on the State Auditor and Insurance Commissioner *ex officio* of this state, or his successors in office, with the same power and effect as that served upon such agent; and such power of attorney cannot be revoked or modified (except that a new one may be submitted) so long as any policy or liability remains outstanding against said company in this state. Whenever such lawful process against any insurance company shall be served upon the Commissioner he shall forthwith forward a copy of the process served on him by mail, postpaid, and directed to the secretary of the company, or in case of companies of foreign countries, to the resident manager in this country; and shall also forward a copy thereof to the general agent of said company in this state.

Said company shall also file a certified copy of their charter or deed of settlement, together with a statement under the oath of the president or vice-president, or other chief officer, and the secretary of the company for which they may act, stating the name of the company and the place where located, the amount of its capital with a detailed statement of the facts and items, as required from companies organized under the laws of this state, as per Section 3920 (4058) hereof; such statement shall also show to the full satisfaction of the State Auditor and Insurance Commissioner *ex officio* that said company,

if organized without the United States of America, has deposited in some one of the United States or territories, a sum not less than one hundred thousand dollars for the special benefit or security of the assured therein, and shall file also a copy of the last annual report made under any law of the state, territory or foreign country by which said company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by the liabilities, as stated in Section 3920 (4058) of this chapter, to the extent of twenty per cent thereof while such deficiency shall continue; provided, that any company formed for the purpose of carrying on the business of plate glass, health, accident, livestock, steam boiler, hail and cyclone, credit or other liability insurance, both foreign and domestic, shall have not less than one hundred thousand ($100,000) dollars of capital stock subscribed, fifty per cent of which shall be paid up in cash, and invested as provided by the laws governing the investment of capital stock of fire insurance companies. (Approved February 28th, 1913.)

REVISED CODES OF MONTANA 1907, SECTION 6519.

Service on Corporations. Any corporation organized under the laws of the State of Montana, or doing business therein, may be served with summons by delivering a copy of the same to the president, secretary, treasurer, or other officer of the corporation, or to the agent designated by such corporation as the person upon whom service shall be made as required by law, and if none of the persons above mentioned can be found in the county, then service may be made upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station-keeper, managing agent or other agent, having the management, direction, or control of any property of such corporations. If none of the persons in this section described can be found in the county in which such action is commenced, then service may be made, as provided in this section, upon any of the persons herein described in any county of this state. And if

none of the persons above named can be found in the State of Montana, and an affidavit stating that fact shall be filed in the office of the clerk of the court in which such action is pending, then the clerk of the court shall make an order authorizing the service of summons to be made upon the Secretary of State, who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said Secretary of State shall be deemed personal service upon said corporation. (Amendment approved February 18, 1915; Laws 1915, p. 31.)

REVISED CODES OF MONTANA 1907, SECTION 5214.

Interest—Judgment. Interest is payable on judgments recovered in the courts of this state, at the rate of eight per cent (8%) per annum, and no greater rate, but such interest must not be compounded in any manner or form. (Act approved February 28, 1899.) (6th Sess. 125.)

MINNESOTA STATUTES.

GENERAL STATUTES OF MINNESOTA 1913, SECTION 3536.

Policies of Associations Confining Membership to Commercial Travelers, etc. Any domestic assessment, health and accident insurance association now licensed to do business in this state which confines its membership to commercial travelers and which does not pay commissions or other compensation for securing new members shall be exempt from the provisions of law relating to the form and contents of policies of health and accident insurance when approved by the Commissioner of Insurance. ('13, C. 410, Section 1.)

GENERAL STATUTES OF MINNESOTA 1913, SECTION 5805.

Rate. The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted

for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than ten dollars on one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity (2733).

SPECIFICATIONS OF ERROR.

I.

The evidence does not support the trial court's finding of fact that on the 6th day of November, 1908, and at all times thereafter, until and including the 13th day of March, 1916, defendant was engaged in the business of health and accident insurance on a mutual plan and *transacted such business in the State of Montana.*

II.

The trial court's finding as a conclusion of law that the plaintiff was entitled to recover of the defendant herein is not supported by the evidence or the findings of fact in that there is no evidence or finding that the cause of action on which the Montana judgment was based arose in Montana and *the evidence is conclusive that said cause of action did not arise in Montana.*

III.

The evidence does not support the trial court's finding as a fact that the Montana judgment was duly made and entered upon the merits as alleged in paragraph 6 of the amended complaint in that the evidence is conclusive that said judgment was made and entered by default without jurisdiction over the defendant or the cause of action and is wholly void and deprives defendant of its property without due process of law in violation of the United States Constitution.

IV.

The trial court's finding as a conclusion of law that the plaintiff was entitled to recover of the defendant interest on $6,545.90 at the rate of 8% per annum from the 24th day of October, 1917, until the entry of judgment herein, is contrary to Section 5805, General Statutes of Minnesota 1913.

BRIEF OF THE ARGUMENT.

The petitioner's position may be briefly outlined as follows:

1. *The petitioner is not and never has been transacting business within the State of Montana so as to enable the courts of that state to acquire personal jurisdiction over it by substituted service of process on a state official. The default judgment based on such service is therefore void as a violation of the due process clause of the Federal Constitution and should not have been given full faith and credit by the Courts of Minnesota.*

The mere writing or carrying of insurance on the lives or health of persons who may reside in Montana, coupled

with the receipt of premiums from such persons are acts over which the State of Montana cannot constitutionally exercise any control and do not constitute the doing of business which is essential to the implication of a consent by the petitioner to substituted service of process on state officials.

The petitioner has never been licensed to do business in Montana, has never expressly consented to substituted service on state officials, has never owned property there, has never made contracts there, has never performed contracts there, has never had any office there, has never had any agents there, and has never done any act in Montana which constitutes "doing business" there.

2. *Irrespective of whether or not the petitioner is or was doing business in Montana, the cause of action on which the Montana judgment is based arose in Minnesota and not in Montana and the Courts of Montana cannot acquire jurisdiction over such a cause of action by substituted service of process on state officials to which the petitioner has never actually consented.*

3. The petitioner is not estopped to question the jurisdiction of the Montana Court by reason of having objected to this jurisdiction in the original action in Montana.

4. Even if the Montana judgment were entitled to full faith and credit in the Courts of Minnesota, the respondent would only be entitled to interest from the date of the Montana judgment at the rate of six per cent in accordance with Minnesota Law and not at the rate of eight per cent as provided by Montana Law.

I.

The petitioner is not and was not in 1908 or 1916 or at any other time "doing business" in the State of Montana.

The summons and complaint in the original action in Montana were served on the Insurance Commissioner and on the Secretary of State of Montana. The respondent attempts to justify this service under the Revised Codes of Montana for 1915, Section 4062, as amended by Laws 1913, page 54, and Section 6519 as amended by Laws 1915, page 31.

It will be noted at the outset that the first section above mentioned which provides for service on the Insurance Commissioner requires any foreign insurance company, before taking risks or transacting any business of insurance in Montana, to file with the State Auditor a written instrument consenting that service of process may be made on the State Auditor and Insurance Commissioner *ex officio* of Montana. *There is no provision in this section or in any of the Statutes of Montana for service on the Insurance Commissioner in case this written authority is not filed.* It is conceded in the present case that no such written authority was ever filed. It is obvious, therefore, that the service of process on the Insurance Commissioner was wholly without any authority whatsoever in the Statutes of Montana and was wholly without any effect unless the petitioner was doing business in Montana and therefore estopped to deny compliance with the Statutes.

The service on the Secretary of State was apparently attempted under the other section of the Montana Statutes referred to which provides that any corporation *doing business in the State of Montana* may be served with sum-

mons, if all the other methods provided fail, by serving the Secretary of State. We do not pretend to question the constitutionality of this section; but it is only constitutional because it requires as a condition precedent to such service that the corporation be doing business in Montana.

The fundamental limitation on the jurisdiction of the courts of a state is the general principle of international law that a state cannot reach out and exercise control over persons or property not within its border. The application of this principle to cases involving individuals is a comparatively simple matter. They must be personally served within the state. A corporation on the other hand, being nonexistent physically, cannot be personally served excepting by service on its actual agents. In other words, such service is personal service on a corporation. This must necessarily be so and was recognized at an early date by this Court.

> "The doctrine of that case (*Pennoyer v. Neff*, 95 U. S. 714) applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the Statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties

arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

* * * * * * * * *

"All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

"The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created" (*St. Claire v. Cox*, 106 U. S. 350.)

So it has been repeatedly held that no Statute is necessary to justify service of process on a corporation by serving one who is actually the corporation's agent. Such service, being personal service on the corporation, is valid irrespective of Statute.

In re Hohorst, 150 U. S. 653.

Barrow Steamship Company v. Kane, 170 U. S. 100.

Newby v. VanOffen, L. R. 7 Q. B. 293.

In the present case there was no service on anyone actually authorized by the petitioner to accept service. In other words there was no service on any agent of the

Association. If the service on the state officials of Montana is binding on the petitioner, it can only be because from the facts of the case the consent of the petitioner to such service can be implied. Such an implication arises only if the petitioner has engaged in transactions which the State of Montana had the right to prohibit. In order to imply such a consent, it must be shown that the petitioner did something which the State of Montana had a right to prevent it from doing and therefore the right to impose conditions on its doing. The cases which perhaps illustrate more clearly than any others that this is the only basis on which substituted service on a state official can be supported in the absence of express consent are those cases which hold that a State Statute authorizing substituted service on a non-resident individual who is doing business within the state is unconstitutional because the state has no right to prevent or prohibit a non-resident individual from doing business within its borders and no right to impose conditions on his so doing and therefore no consent to such service can be implied from his so doing.

Flexner v. Farson, 248 U. S. 289.

Cabanne v. Graf, 87 Minn. 510, 92 N. W. 461.

Mordock v. Kirby, 118 Fed. 180 (C. C. W. D. Ky.).

Brooks v. Dunn, 51 Fed. 138 (C. C. W. D. Tenn.).

Caldwell v. Armour, 43 Atl. 517, 1 Pennewill 45 (Del.).

Oddly enough even the Minnesota court in *Cabanne v. Graf*, *supra*, has recognized that this implication of consent to service other than personal service from the fact that the defendant has committed some act which the state has the right to prohibit is the only basis of jurisdiction

over non-resident corporations.

> "Such non-resident person, unlike a corporation, carries on business in this state not by virtue of its consent, but by virtue of the Federal Constitution which guarantees to the citizens of each state all privileges and immunities of citizens of the several states; hence it cannot be implied from the fact that he does business within the state that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of process on his agent. He submits his property which he sends into the state to the jurisdiction of its courts, but not his person" (*Cabanne v. Graf*, 87 Minn. 514).

We call attention to this fundamental conception principally for the purpose of demonstrating the fallacy of the contention that counsel for the respondent advanced on the argument below, to-wit: That as the petitioner's "method of writing insurance was identical everywhere, defendant's contention that it wrote no business in Montana is tantamount to contending that it wrote no business anywhere." It is not the doing of every act which is in any manner connected with the State of Montana that constitutes "doing business" as that term has been construed by the courts for the purpose of determining jurisdictional questions.

It is established by the decisions of this court that in an action against a domestic corporation on a foreign judgment which was based on substituted service of process the ultimate question of whether or not the foreign court rendering the judgment had jurisdiction and the preliminary questions of whether or not the defendant was doing business in the foreign jurisdiction and whether or not the cause of action arose therein are all of them questions arising under the Constitution of the United States, and

the decisions of this Court constitute the only final and controlling authority.

Thompson v. Whitman, 9 Wall. 459.

Scott v. McNeal, 154 U. S. 34.

Conn. Mutual Life Insurance Company v. Spratley, 172 U. S. 602.

Old Wayne Life Association v. McDonough, 204 U. S. 8.

Provident Savings Society v. Kentucky, 239 U. S. 103.

The decisions of this Court clearly establish the principles by which this case must be governed and the decision of the Minnesota Supreme Court disregards these principles and these decisions. Both the trial court and the Minnesota Supreme Court were embarrassed and perhaps prevented from giving this case their unbiased consideration by the previous decision of the Minnesota Supreme Court in *Wold v. Minnesota Commercial Men's Association*, 136 Minn. 38, 162 N. W. 461. The trial court felt that it was absolutely controlled by this decision (Record, page 105). The Supreme Court, inferentially at least, recognized the doubt which the full and complete arguments in the present case had thrown on the previous decision when they stated in their opinion that

> "Our conclusion is that the Wold case should be followed until the Federal Supreme Court shall pronounce it erroneous."

This Court is of course not bound by or subject to the influence of the Wold case. This previous Minnesota decision will be analyzed later and it will appear that it was not only unjustified on principle but also without support in the cases relied on and cited to support it. We will first, however, review the previous decisions of this

Court which are controlling in the present case.

There are only a few aspects of the business as carried on by the petitioner which are or can be seriously urged as constituting the doing of business in Montana. The record is clear, and indeed the respondent has never denied, that the petitioner has never owned any property in Montana; that it has never been licensed to do business there; that it maintains no office there; that it has never made any contracts there; that it has never done any acts there pursuant to or in performance of its contracts; that it has never made any contracts to be performed there (unless the right to investigate losses and the fact that no specific place is provided for the payment of losses gives to its contracts this characteristic); and that it has never had any agents there (unless every member is an agent).

The holding of the Minnesota Courts that the petitioner was doing business in Montana must therefore be predicated on a holding that one or more of the following facts constitute doing business:

1. Carrying insurance on the lives or health of persons who reside in Montana coupled with the receipt of assessments and dues in Minnesota from such persons.

2. The unexercised right of the petitioner to investigate losses in Montana.

3. The fact that because no place is specified for the payment of losses they are payable at the residence of the insured although no payments have ever been actually made in Montana.

4. The activity of members of the Association while in Montana in inducing others to apply for membership.

For convenience sake we will consider separately each of the four characteristics of the petitioner's course of

business which is urged as a justification of the decision of the Minnesota Court.

(1) *The mere carrying or writing of insurance on the lives or health of residents of Montana coupled with the receipt at Minneapolis of assessments* and dues does not constitute doing business in Montana and cannot be prohibited, prevented or regulated by the State of Montana.

The receipt at Minneapolis of applications for membership from residents of Montana by mail, the acceptance thereof by the Board of Directors and the issuance of certificates thereon at Minneapolis and the forwarding of them by mail to the applicant, the mailing of notices of assessment to members and the receipt at Minneapolis of assessments and dues, the receipt of proofs of claim, the submission of these to the Board of Directors at Minneapolis and the mailing of checks payable at Minneapolis in payment thereof—in short the usual course of business of the petitioner requires no act to be performed outside the office of the Association in Minneapolis and could not on any conceivable theory constitute the doing of business in Montana. The only way in which this business is connected in any manner with the State of Montana is that the person insured may be a resident of that state. *It can no longer be contended that entering into a contract of insurance in one state with a resident of another state constitutes doing business therein.*

Allgeyer v. Louisiana, 165 U. S. 578.

The case cited involved the constitutionality of a Statute of Louisiana subjecting to a fine any person who does any act within Louisiana to effect for himself insurance on property then within that state in any marine insurance company which has not complied with the Laws of Louisi-

ana. The defendant had taken out an open policy of marine insurance with a New York company, the contract having been made in New York. Pursuant to the terms of this contract he mailed in Louisiana to the insurer in New York a letter notifying them of the shipment in question which was at that time in Louisiana. Under the policy, the insurance on this shipment became effective at once. This Court held that as applied to such a case the Louisiana Statute was unconstitutional because a contract of insurance made in New York was not subject to the control or regulation of the State of Louisiana and the letter of notification did not constitute a new contract but was simply the means by which the original contract was made applicable to particular property. The mere fact that the property covered by the contract of insurance was within the State of Louisiana gave that state no control over the contract. In the course of the opinion Mr. Justice Peckham said:

> "The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the state of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the State of Louisiana of such a notification as is mentioned in this case is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state" (165 U. S. 592).

As the State of Montana cannot restrict or regulate the making of a contract of insurance in Minnesota between a Minnesota corporation and a resident of Montana, neither can it regulate or impose conditions on the continuation of policies on lives or property in Montana or the performance of such contracts of insurance where the insurance company does not perform any acts within the State of Montana.

In *Provident Savings Society v. Kentucky*, 239 U. S. 103, the State of Kentucky attempted to collect from a foreign insurance company the license tax imposed by its laws for the privilege of doing business within the state. The company had concededly done business in Kentucky prior to January 1st, 1907, but denied liability thereafter on the ground that it had then entirely ceased doing business and withdrawn all its agents and that all premiums received after that date on policies previously issued in Kentucky were received at its Home Office in New York. A demurrer to the answer setting up these facts as a defense was sustained and this ruling was affirmed by the Court of Appeals of Kentucky (*Provident Savings Society v. Commonwealth*, 160 Ky. 16). The theory on which the Kentucky Court proceeded is illustrated by the quotation from its opinion contained in the opinion of this Court:

> "'However, counsel for appellant insists that an insurance company is doing business in this state in the meaning of the statute so long as it is insuring the lives of residents of this state and furnishing protection to the beneficiaries named in the policies against loss from death of the insured, this being the chief business for which insurance companies are organized, and we are unable to see how the court' (referring to the court of first instance) 'held, that a company collecting premiums on policies issued in this state, when

> it was authorized to do business in this state, can be said "not to be doing business," when it was still insuring those same lives and collecting the premiums upon the policies'" (239 U. S. 111).

The exact question now before the Court was therefore presented by that case, to-wit, whether or not the mere fact that a foreign insurance company writes or carries policies covering lives or property in a state constitutes the doing of business within that state. Reversing the Kentucky court, this Court held that this did not amount to the doing of business in Kentucky. The principles which governed that case must control in the present case. In the course of his opinion Mr. Justice Hughes summed up the matter as follows:

> "Upon the averments which stand admitted in the record it must be assumed that *it was not performing any acts within the jurisdiction of Kentucky.* It had sought to withdraw itself completely from the state. The conclusion that it continued to do business within the state, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that state and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the state's consent. *But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the state.* It is true that acts might be done within the state in connection with

such policies, as for example in maintaining an office or agents although new insurance was not written or solicited, which could be considered to amount to the continuance of a local business. *In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written.* These policies are contracts already made; the state cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. *Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control. Allgeyer v. Louisiana*, 165 U. S. 578; *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 241; *New York Life Insurance Co. v. Head*, 234 U. S. 149, 163" (239 U. S. 113, italics ours).

The application of this language to the facts of the case at bar is patent. A state can no more obtain jurisdiction over a foreign corporation by substituted service, unless such corporation does acts which are dependent on the consent of the state, than it can impose a license tax. The making of a contract in Minnesota is an act over which Montana cannot exercise control even though such contract be made with a citizen of Montana and concerns persons or property situated in Montana; the obligations of such contracts are just as sacred as those in the case cited. In order to justify the assumption of jurisdiction by the Montana Courts, therefore, there must have been some acts done by the petitioner within that state in connection with such contracts which amount to the transaction of business in Montana, and it is submitted that the record is wholly devoid of any evidence of such acts. In issuing, at its only office in Minneapolis, insurance policies or certificates of membership to persons resident temporarily or permanent-

ly in Montana, petitioner is doing nothing over which the State of Montana can exercise any control; petitioner's right to enter into contracts in Minnesota is in no way dependent on the consent of the State of Montana, and from this fact no consent to substituted service of process on the state officials of Montana can be implied.

Nor do the subsequent dealings between the Association and a member constitute doing business elsewhere than in Minnesota, where they consist solely of the use of the United States mail for the purpose of forwarding notices of assessments and dues, the receipt of funds covering same, the receipt of proofs of loss and the forwarding of checks in payment thereof, where no act is done by or on behalf of the petitioner excepting at its Minnesota office, where all payments, whether to or by the Association, are in Minneapolis exchange, where all investigation, adjustment and other exercise of discretion or judgment is the sole and exclusive right of the Board of Directors sitting in Minneapolis, and where no person is authorized or permitted to do any act which creates or discharges a legal liability excepting said Board of Directors.

Not only has this Court clearly expressed itself to the effect that where a foreign insurance company has done no act within a state which can constitutionally be prohibited or regulated by that state it is not doing business within that state, merely because it carries insurance on lives or property situated there and receives at its Home Office premiums and proofs of loss and settles and adjusts losses at its Home Office, but this has been the uniform expression of all the Federal Courts.

> "Certainly the issuing of a policy in New York on property here (Arkansas) cannot be considered as the carrying on of business in this state within the intent

and meaning of the Statute in question."

Marine Insurance Company v. St. Louis, I. M. & S. Railway Company, 41 Fed. 643, 653 (C. C. E. D. Arkansas).

"But the plaintiff here contends that 'the very act of insuring property situated in the State of Maine is of necessity doing business in that state,' and he necessarily concedes that the defendant company did not have 'an office or agent in the state.' There is no proof here that the company ever issued other fire policies covering property in that state, and the question simply is whether the insurance, by correspondence, of property in a state belonging to a resident therein by a foreign insurance company, is carrying on or doing business in such state. If A, a resident of Maine, should, while at Memphis, personally procure insurance on his property there, in a Memphis company, and immediately pay the premium, could it be insisted that the transaction was a Maine one? Or if the owner of a ship or cargo at sea, or in a foreign port, should himself, at Memphis, so effect insurance thereon in such company, would it be contended that the transaction was other than a contract made in Tennessee, or that the business was done elsewhere than in this state? Or, in the case first put, would the fact that the business was negotiated by correspondence make it any less business done here?"

Hazeltine v. Mississippi Valley Fire Insurance Company, 55 Fed. 743, 747 (C. C. W. D. Tenn.).

"But the mere existence of these two policies in the hands of persons resident in the state does not make out the doing of business within it by the company with whom they were negotiating and by whom they were written entirely outside of it. The business, such as it was, was done and completed when they were issued. Otherwise the mere change of residence into the state by persons holding policies obtained elsewhere would be enough to establish the charge and that will hardly be contended for."

Frawley, Bundy & Wilcox v. Pennsylvania Casualty Company, 124 Fed. 259, 264 (C. C. M. D. Pa.).

As indicated by the passage last quoted, any other result is practically inconceivable. The results of making the doing of business by an insurance company dependent on the location of the risk, be it property or person, are too obviously preposterous to permit the serious consideration of such a contention. Except in the single case of immovable property, the risk, whether it be property or person, may move from state to state with or without the knowledge of the insurer and the company may thus at any time discover that it is violating the law and is subject to heavy penalties unless it has procured licenses in all the states of the Union. Were it not for the fact that the Minnesota Supreme Court has held to the contrary both in this case and in the previous decision already referred to, we would not have deemed it necessary to present this question as fully as we have. An analysis of this previous decision and the cases relied upon in reaching it will illustrate and explain how the Minnesota Court was drawn into this obvious error.

The opinion in *Wold v. Minnesota Commercial Men's Association*, 136 Minn. 380, 162 N. W. 461, on this question is brief and sets forth the facts on which the court relied in holding that the defendant was doing business in Wisconsin. We therefore quote it verbatim.

> "Defendant is a purely mutual insurance company incorporated under the laws of the State of Minnesota, and has its office or place of business in the city of Minneapolis. It has no other office or place of business anywhere, and has no agents of any kind except the officials at its Minneapolis office. Plaintiff is, and for many years has been, a resident of Amherst in the State of Wisconsin. Defendant from its Minneapolis office mailed plaintiff at Amherst a blank application for membership accompanied by a circular soliciting members. Plaintiff filled out the application at Am-

herst and mailed it to defendant at Minneapolis. Defendant made out and executed the certificate of contract of insurance at Minneapolis and mailed it to plaintiff at Amherst. Thereafter defendant mailed notice of assessments as they became due to plaintiff at Amherst, and plaintiff transmitted the amount of such assessments by mail to defendant at Minneapolis. Defendant obtained other members residing in Wisconsin in the same manner and conducted its business with them in the same manner. Although defendant had no soliciting agents, it offered premiums to its members for procuring others to become members, and the notices of assessment sent to plaintiff and others were usually accompanied by blank applications for membership for use in procuring additional members. The insurance contract gives defendant the right to make such examination and investigation as it sees fit concerning claims arising under its contracts, including the right to make medical and post mortem examinations, and also requires that disputed claims be submitted to arbitration. That procuring members, collecting assessments, and conducting business in the manner stated, constitute doing business in the state of which the members so procured are residents, we think is no longer open to question. *Kulberg v. Fraternal Union of America*, 131 Minn. 131, 154 N. W. 748; *Braunstein v. Fraternal Union of America*, 133 Minn. 8, 157 N. W. 721; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Commercial Mut. Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782; *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557, 124 N. W. 502."

It is obvious that the cases cited were considered as conclusive. But on examination it will be found that none of these cases is in conflict with petitioner's position. The rule for which they all stand is that, when a foreign insurance company has once been doing business in a state and subsequently withdraws its agents and ceases to do new business there, it may nevertheless be sued there in all actions arising out of policies which were written in that state prior to its withdrawal and in respect to such actions the

company remains subject to service of process in accordance with the laws of that state. The petitioner does not presume or intend to question the soundness of such a rule.

Mutual Life Insurance Co. v. Spratley, 172 U. S. 602, and *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, on their facts go no further than the proposition as stated above. In the opinions, however, there is language used which does seem to announce a broader principle and it was doubtless this language which led the Minnesota Court to rely on these cases in the Wold case. This language must, however, be read in the light of its more recent interpretation by this Court which used it, and the reliance on these cases in the Wold case was doubtless due to the fact that the subsequent decisions of the United States Supreme Court, expressly limiting the Spratley and Davis cases, as authority, to the particular facts involved in them, were not called to the court's attention. If the Minnesota Court's attention had been invited to *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573, and *Provident Savings Ass'n. v. Kentucky*, 239 U. S. 103, the question would certainly not have been disposed of without so much as a mention of either of them.

Both the Spratley and Davis cases and also *Mutual Reserve Association v. Phelps*, 190 U. S. 147, and *Mutual Reserve Insurance Company v. Birch*, 200 U. S. 612, similar cases, were considered at length by this court in *Hunter v. Mutual Reserve Life Insurance Company*, 218 U. S. 573. The facts of the Hunter case were subsequently summarized by Mr. Justice Hughes in the Provident Savings Society case, as follows:

> "There the action was brought in New York against an insurance company upon judgments which had been obtained against the company in North Carolina. The

question turned upon the validity of the service of process in the North Carolina actions. The insurance company, a New York corporation, had been admitted to do business in North Carolina and had actually transacted business in that state prior to the year 1899. The legislature of North Carolina enacted a statute providing that any corporation desiring to do business in the state after June 1, 1899, must become a domestic corporation. Severe penalties were prescribed for violation. Thereupon, the Board of Directors of the company passed a resolution 'to withdraw from the state and to dispense with and terminate the services of all its agents.' The agents were withdrawn accordingly and the premiums on policies theretofore issued were subsequently 'remitted by mail to the Home Office of the company in New York, where the policies and premiums were payable.' There were in that case, outside of this course of business, four transactions within the state after the withdrawal, which were of minor importance and of isolated character. The actions in question, in the North Carolina Court, were not brought upon policies issued in North Carolina, and consequently it was sought to sustain the jurisdiction of the court upon the ground that despite the withdrawal of the company, it was still doing business within the state. The court expressly overruled this contention."

The broad language used in the Spratley case, on which the Minnesota Court doubtless relied in deciding the Wold case, and which is urged in support of the respondent's contentions in the present case, is set forth at length in the opinion in the Hunter case. For this reason and because Mr. Justice McKenna's analysis of the Spratley case cannot be improved upon, we quote it in full.

"In the Spratley case the life insurance policy, which was the subject of the suit, was issued by the insurance company when it was concededly present and doing business in the State of Tennessee. The service was upon an agent by the name of Chaffee, sent to investigate into the circumstances of the death of

Spratley and the claims of his widow. These facts distinguish the case from the one at bar. But certain language of the court is quoted to establish, not only was the insurance company so doing business in the state as to justify service of process upon the agent appointed by the company, but doing business generally. The court, through Mr. Justice Peckham, said:

> 'We think the evidence in this case shows that the company was doing business within the state at the time of this service of process. From 1870 until 1894, it had done an active business throughout the state by its agents therein, and had issued policies of insurance upon the lives of citizens of the state. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the state was simply a recall of its agents doing business therein, the giving of a notice to the state insurance commissioner, and a refusal to take any new risks or to issue any new policies within the state. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent.'

"And further:

> 'It cannot be said with truth, as we think, that an insurance company does no business within a state unless it has agents therein who are continuously seeking new risks, and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policyholders to an agent residing in another state, and who was once agent in the state where the policyholders resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis.'

"This reference to the law in the state must be considered. A statute of the state provided that process might be served upon any agent of a corporation doing business in the state found within the county where the suit was brought, no matter what character of agent such person might be, and in the absence of such an agent it should be sufficient to serve process upon any person found in the county who represented the corporation at the time of the transaction out of which the suit arose took place. It was under this statute that service was made upon Chaffee. This service was held good, this court saying, in addition to what has been quoted above: 'Even though we might be unprepared to say that a service of process upon "any agent," found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation.'

"Further explanation of the language of the court is contained in the following passage:

> 'A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done, out of which the dispute arises.' "

The Phelps, Birch and Davis cases are also reviewed in the opinion in the Hunter case and, as is there stated, they are governed by the same principles as the Spratley case and any general language contained in them must be limited and qualified in the same manner as that in the Spratley case.

In *Provident Savings Ass'n. v. Kentucky* (*supra*), Mr. Justice Hughes sums up the result of the Hunter case as a limitation on the broad language used in the earlier cases.

"The defendant in error relies upon expressions contained in the opinions in *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 610, and *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, 157,—expressions which (in a full review of these cases and others) were explained and limited in *Hunter v. Mutual Reserve Life Insurance Company*, 218 U. S. 573. The case cited related to the validity of the service of process upon foreign corporations. And it was held that a foreign insurance corporation which had transacted business within the jurisdiction of a state continued, notwithstanding its withdrawal from the state, in actions arising out of the business so transacted, where the service was made in accordance with the conditions upon which the business was permitted to be done.

* * * * * * * * *

"It was recognized that the authority which the company had given with respect to service of process continued in force as to actions growing out of business which had been transacted within the state. But the continuance of the authority to accept service of process resulted from the nature and construction of that authority, and the view that the mere continuance of the obligation of contracts previously made within the state constituted a continuance of 'doing business' within the state so as to give the company a 'domicil of business' and thus subject it to the state's jurisdiction was distinctly disapproved."

It must be obvious that the Spratley and Davis cases cannot be relied on as authority for the proposition that the mere carrying of risks constitutes doing business. The rule of those cases can have no application until it is determined that the petitioner was doing business in Montana when Benn's policy was issued and that is precisely the question which is raised here.

The two earlier Minnesota cases relied on in the Wold case are *Kulberg v. Fraternal Aid Union*, 131 Minn. 131, 154 N. W. 748, and *Braunstein v. Same*, 133 Minn. 8, 157 N. W. 721. The defendant in these cases was a corporation

resulting from several consolidations and re-organizations. It had never had agents in Minnesota but at least one of its predecessors had concededly done business here, and had filed an appointment of the Insurance Commissioner as agent for the receipt of process in accordance with a statute which required it to consent to such an agency for all suits so long as its policies remained outstanding in this state. The policies sued on in both cases, had been issued by such predecessor in Minnesota prior to its exclusion in 1910. It was clear that the defendant succeeded to the liabilities of its predecessor. In the Kulberg case, Chief Justice Brown held that the facts brought the case within the rule of the Spratley scase, and this of course cannot be questioned. The language, however, used by the Minnesota Court in that case is broader than was necessary for the decision.

The Kulberg case is therefore exactly the same as the Spratley case—the facts are practically identical, and in each case the court stated a broader principle than was necessary to the decision. The United States Supreme Court took the first opportunity to correct this dictum of the Spratley case and when the Braunstein case arose the Minnesota Court did not base its decision on the broad language used in the Kulberg case but on the fact that the action was on a policy written in Minnesota when the defendant or its predecessor was doing business there and the case was therefore within the rule of the Spratley case as limited by the Hunter and Provident Savings Society cases.

These two previous Minnesota decisions do not conflict with petitioner's position any more than the Spratley and Davis cases do. As there is a federal question involved, the limitations placed on the language used in the Spratley

case must apply equally to the opinions in the Minnesota cases.

The Wisconsin case cited in the Wold case (*State v. Columbian National Life Ins. Co.*, 124 N. W. 502), was another case like the Spratley case, where the company had previously been doing business in Wisconsin, but while the court admitted that such a company might still be served by substitution in actions arising out of outstanding policies, it was held that they were not doing business so as to require them to comply with a statute regarding the filing of annual statements, etc. It is therefore identical in its facts and holding with the Provident Savings Society case.

(2) The right reserved by petitioner to investigate losses including the right to cause medical and post mortem examinations to be made was urged at the trial and will doubtless be urged here as constituting the doing of business in Montana.

We submit, however (a) that until such a right is exercised and agents are actually sent into Montana for these purposes the mere existence of the right cannot be held to be doing business, and the record is devoid of any evidence that this right has ever been exercised in Montana (b) that in any event investigation of claims by a foreign corporation is not such transaction of business as to subject the company to substituted service of process.

(a) The first proposition above must be self-evident. The right reserved is to investigate losses wherever they may occur. Petitioner's membership is made up of traveling men and the great majority of losses will naturally occur when the members are "on the road" and absent from their residences. If the reservation of the right to investigate is doing business wherever losses occur, peti-

tioner will be required to take out a license and pay the requisite taxes in every state in the Union to insure itself against involuntary violations of foreign corporation statutes and the consequent fines and penalties universally imposed therefor. The right to investigate is invariably reserved in every insurance contract. If this means that the company is doing business where the loss occurs, then, in effect, the location of the risk, be it property or person, becomes the test, although as has been already pointed out this test will not stand analysis and has been expressly repudiated by the United States Supreme Court.

It must be obvious that the mere making of a contract in Minnesota cannot under any conceivable theory constitute the doing of business in Montana, no matter what the terms of the contract are. Even if the contract were to be fully performed in Montana, there would be no doing of business in Montana until its performance was commenced and there was some act done in Montana. In this case, therefore, even if the actual investigation of losses in Montana could be regarded as the doing of business, which we do not concede, there is not any evidence that an investigation has ever been made of a loss in Montana and the evidence is clear to the effect that there was no investigatio. made of the particular loss involved in this case. This Court has held in accordance with the universal trend of authority that where a foreign insurance company sends its adjusters into a state with the power and authority to settle, compromise and adjust claims against it, it is doing business within that state.

Lumbermen's Insurance Company v. Meyer, 197 U. S. 407.

But it will be noted that the Court in the case cited

was very careful to expressly limit this holding to the exact facts of the case and by its statement of the rule it implies what must necessarily be true, i. e., that until the adjusters are actually sent into the state there is no doing of business therein by virtue of the mere right to send them there.

> "*When* under the terms of the contract the company sends its agent into the state where the property was insured and where the loss occurred for the purpose of adjustment it would seem plain that it was *then* doing the business contemplated by its contract within the state."
>
> 197 U. S. 414.

(b) *Not only is it clear on principle that the reservation of the right to investigate losses does not constitute doing business, but the authorities are unanimous in holding that the actual investigation of claims does not subject a corporation to the foreign corporation laws of the state where the investigation is made.*

We have already reviewed the undisputed testimony regarding the normal and usual method employed by petitioner in settling claims. Proofs of loss and the attending physician's reports are mailed to Minneapolis and are passed on there by the Board of Directors. In the ordinary case this is all that is required. It is occasionally impossible to get the required information from the attending physician. Blanks are then mailed to some local physician selected by the company from a list of reputable local doctors. The company could, of course, make any further investigation it deemed necessary. There is not even a suggestion anywhere in the record that this right has ever been exercised in any state, much less in Montana, and it is clear that no such investigation was made in regard to Benn's death. Even if an investigator were sent

out it would be a violation of the By-laws to clothe him with any authority beyond mere inquiry. The sole power to adjust, compromise or pay claims rests in the Board of Directors. Under these circumstances neither a local examining physician nor an investigator would be transacting business for the petitioner so as to authorize substituted service of process, even if it could be shown that any such examinations or investigations have ever been made in Montana.

In *Higham v. Iowa State Travelers' Assn.*, 183 Fed. 845 (C. C. W. D. Mo., W. D.), an action against a foreign corporation carrying on a business practically identical with that of the petitioner, except that no resident physicians are employed by the petitioner, the summons was served on one Dr. Watson whose relation to the company was described as follows by the court:

> "He was a resident physician of Kansas City, Mo., to whom the company from time to time wrote letters asking him to call on traveling men who had been injured, and who claimed indemnity against the company. It may, perhaps, be conceded that such reference was made to him in most matters occurring within this jurisdiction. On such occasions he visited the disabled person, examined him, and reported to the company whether he thought the man permanently or only temporarily disabled, and in some instances how long he thought the disability would continue. For this service he was paid a physician's fee in each case. He was not under salary, had no blanks to fill out, made no recommendations as to indemnity, adjusted no losses, had no power to contract or pay either losses or indemnities if allowed. His contractual relations with the company, such as they were, ceased with each individual case. The company was under no obligation to call upon him again. He never had any instructions from the company defining the duties of an agent. He did not act in the present case at all; never saw Robert Higham before

> or after death; and never heard from the company respecting this case until after he had been served with process, and that through its attorneys. It is quite evident, therefore, that he was not clothed with authority to adjust or pay this loss, or any loss, nor that he was ever appealed to for such purpose."

The defendant appeared specially contending that such service was not due process of law and this contention was upheld. The court says:

> "The only question then is whether the fact that he was from time to time employed by the company in isolated cases to report upon the physical condition of the injured policy holder makes him a person who aids or assists in doing any of the acts named in the statute so as to constitute him such an agent of the company that the state, exercising legislative power within the lawful bounds of due process of law, may designate him as one upon whom legal service may be made. My conclusion is that he does not stand in such a representative relationship to the company as to satisfy the requirements prescribed by the courts. I do not think such is the meaning of the statute in question, and, if that be the interpretation, then the Legislature has not kept within the lawful bounds of due process of law. To hold otherwise would be to uphold service upon those having the most casual connections by correspondence with foreign corporations. Such a ruling carried to its necessary logical conclusions discloses its own weakness. Mere knowledge or notice that might thus be brought home to the party sued would be insufficient without legal service."

Even if petitioner had occasionally caused investigations, other than medical examinations, to be made in Montana, the case would fall well within the rule regarding isolated transactions and substituted service could not be justified.

Buffalo Sandstone Company v. American Sandstone

Company, 141 Fed. 211 (C. C. W. D., N. Y.).

Hays v. General Association American Benevolent Association, 104 S. W. 1141, 127 Mo. A. 1141.

In the latter case the facts are stated by the court as follows:

> "But it is contended by plaintiff that D. C. Scott, on whom service was had as an agent of defendant corporation, was engaged in transacting business for the corporation in Montgomery county at the time the summons was delivered to him. The affidavit of Scott (conceded to be true) shows plaintiff had made a claim on defendant corporation for damages caused by the facts alleged in the petition, and that Scott, as agent of defendant company, went to Montgomery County to investigate the claim, and while there making such investigation the summons was delivered to him."

This service was held invalid.

If service cannot be made on the investigator or the doctor in such cases it must follow, *a fortiori*, that the acts done by them do not constitute "doing business."

In *Pembleton v. Illinois Commercial Men's Association*, 124 N. E. 355, 289 Ill. 99, it appeared that it was the recognized practice of the defendant to send out an officer or director to investigate claims and report back. It was held, however, that the defendant was not "engaged in business" in the state where the investigations were made.

It may be noted that we are here concerned with *investigation only* and do not pretend to criticize cases upholding service on *adjusters* with authority to compromise, settle and pay claims and accept releases on behalf of the company, although we submit that there is no case upholding service, even when made on an adjuster, except in an action on the particular claim being adjusted by the person served.

(3) It is urged by the respondent that because neither the certificate of membership nor the By-laws specifically provide that payments of losses shall be made at the Home Office in Minneapolis, losses are therefore payable at the residence of the member or his beneficiaries in accordance with the general rule that unless there is some indication of a different intention payments due under a contract are payable at the residence of the payee. We do not believe that this rule has any application to the facts of the present case. An examination of the By-laws of the Association will indicate that they contemplate no act on its behalf at any other place than the petitioner's Home Office in the State of Minnesota. There is in the Record the uncontradicted testimony of the cashier of the Association to the effect that no payments are or ever have been made at any other place; that all payments are made by check drawn on a Minneapolis bank and either handed to or mailed to the member or his beneficiaries; that no drafts on the Association are ever honored; in short, that in the entire history of the Association no act has ever been done by or on behalf of the Association in connection with the payment of any loss excepting at its Home Office in the State of Minnesota. There is therefore in this case every indication that payment of losses was not intended to be made at any other place than the petitioner's Home Office.

But, if it be assumed that losses are payable at the residence of the individual members, it is clear that no advantage has ever been taken of this fact and that no payment has ever been made in accordance with this construction of the contract. This being so, the mere fact that payments are due in other states could not constitute the doing of business in those states until and unless payments were actually made there. In this respect the obli-

gation of making payments would stand on the same footing as the right to make investigations. Until the one is fulfilled or the other exercised in a manner which involves some act within the State of Montana, they form no basis for arguing that the petitioner is doing business in Montana.

(4) *The action of members in inducing others to apply for membership in petitioner's Association is not the transaction of business by the petitioner* because (a) the members are in no sense agents of the Association, and (b) mere solicitation of applications, which is all the members do in any event, is not "doing business."

(a) The by-law providing that "every member of this Association shall use his influence in furthering the interests thereof" does not make every member an agent of the Association. The mere statement of this proposition would seem to be sufficient. However, considerable stress was laid on this by-law at the trial and we therefore quote from *Tomlinson v. Iowa State Traveling Men's Assn.*, 251 Fed. 171 (D. C. W. D., Mo.), where this specific question was discussed at length:

> "The By-laws contain the following altogether general provision:
>
> Every member of this Association shall use his influence in furthering the interest of the same.
>
> As is stated in the affidavit of the president, from time to time circular letters are written to the several members of the Association urging them, in the spirit of this by-law, to acquaint their brother traveling men with the virtues of said Association and the advantages of membership therein; but the defendant has no paid agents, servants, officers, nor representatives to secure members or solicit applications for membership. The services of the members in this regard, if rendered, are purely voluntary and without consideration, neither are their activities directed to-

ward any particular locality; nor do they contemplate the confines of any state. It will be noted that the defendant is a traveling men's association. Traveling men meet in all parts of the country. A member of the Association from Maine may meet a Missouri commercial traveler in the State of Washington, and there suggest to him the attraction of a certificate in this Iowa company. The fact that the same sort of transaction may have taken place in Missouri between citizens of Missouri, or between a citizen of Iowa and a citizen of Missouri, does not alter the case. The by-law itself, when passed, probably did not contemplate the circulars to which reference has been made, and certainly neither by-law nor circular has in view any particular locality in which the member shall use his influence in furthering the interest of the Association. These so-called agents of the defendant, who are relied upon as localizing its business in Missouri, represent the defendant in no such sense as would authorize and validate the service of summons upon them in such manner as to bind the company."

See to the same effect *Schwayder v. Illinois Commercial Men's Association*, 255 Fed. 797 (D. C. D. Colo.).

Members receive no compensation. The contention that the advertising matter offered from time to time as prizes or premiums for securing applications is compensation does not merit serious discussion. They have no authority to do any acts whatsoever on behalf of the company and are not subject to the control or direction of the company, nor are they answerable to the company for anything they may do. In short they are not agents of the company in any sense of the word.

(b) The fact remains, and we have no reason to dispute it, that members do induce others to apply for membership in the Association. As this action on their part is entirely voluntary and not in any way binding on the petitioner nor subject to the control or direction of peti-

tioner, it is difficult to conceive of a theory on which it could be held to be the transaction of business by petitioner. However, even if the members could be regarded as agents, the mere solicitation of applicants would not be "doing business." This is clearly established by controlling decisions of this Court which have been repeatedly followed and cannot now be questioned.

Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 531, is the leading case on the subject. The rule is there stated:

> "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

International Harvester v. Kentucky, 234 U. S. 579, while it limits the doctrine of the Green case to facts which disclose *nothing more than mere solicitation*, does not in any way question the correctness of the rule. After quoting the above passage from the Green case, the court distinguishes the Harvester case:

> "In the case now under consideration there was *something more than mere solicitation*. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky."

The doctrine of the Green case has been invariably applied in cases involving mere solicitation, both by the Supreme Court and by the other Federal Courts.

People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79.

Atchinson, T. & S. A. Ry. Co. v. Weeks, 254 Fed. 513 (C. C. A., 6th Cir.).

Graustein v. Rutland R. Co., 256 Fed. 409 (D. C. Mass.).

The rule as established by the Green case is in no way peculiar to railroads but is of general application as shown by the Tobacco Co. case, *supra*. And it has been specifically applied to facts identical with those of the present case in *Pembleton v. Illinois Commercial Men's Ass'n.*, 124 N. E. 355, 289 Ill. 99.

After discussing the Green case and the limitation placed on it by the Harvester case, the Illinois Court concludes that

> "On the facts in that case (the Harvester case), and this, they are clearly distinguishable. It seems to be conceded that there was no authority here to pay for the insurance in money, check or draft, or take notes payable on banks in Nebraska. The only thing that the person soliciting insurance in this case could do was to forward the money, check or draft for premium with the application to the head office in Chicago for the approval of the appellant association."

The Illinois Court in the Pembleton case had an earlier decision of its own to contend with. *Firemen's Ins. Co. v. Thompson*, 40 N. E. 488, where it had held that an Illinois insurance company which took a risk in Wisconsin was subject to service of process in the latter state. It was conceded that the reasoning in the earlier case was contrary to the result reached in the Pembleton case, but the court dealt with the situation as follows:

> "The decision in this state as to due process of law under the Fourteenth Federal Amendment must be controlled by the decisions of the Federal Courts rather than by the decisions of our own or other state

courts. *Old Wayne Mutual Life Ass'n. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; *Thompson v. Whitman*, *supra; Forsyth v. Barnes*, *supra*. The decisions of the United States Supreme Court heretofore cited conclusively hold that the mere solicitation of business, as shown by this record, was not such doing business in Nebraska as to render the company liable to service of process therein. It is our duty, under the law, to overrule, if necessary, even our own decisions, and follow the rule laid down by the Federal Supreme Court in matters of this kind. *Rothschild & Co. v. Steger Piano Co.*, 256 Ill. 196, 99 N. E. 920, 42 L. R. A. (N. S.), 793 Ann. Cas. 1913 E 276."

(5) It may conceivably be urged that in spite of the fact that no single aspect of the course of business adopted by the petitioner constitutes, in and of itself, the doing of business in Montana, nevertheless the entire course of business of the petitioner taken as a whole does constitute the doing of business there. We have already demonstrated that none of the facts on which the respondent relies as constituting the doing of business in Montana does, in and of itself and without more, form any basis for holding that the petitioner was transacting business in Montana and there is ample authority to the effect that the course of business of the petitioner regarded as a whole is not doing business in any state other than the state in which it has its Home Office. In at least three very recent and thoroughly considered cases involving facts which cannot be distinguished from the facts of the present case insurance companies whose business was conducted in a manner identical with that of the petitioner were held not to be doing business in states other than that of their incorporation.

Tomlinson v. Iowa State Traveling Men's Ass'n., 251 Fed. 171 (D. C. W. D. Mo.).

Schwayder v. Illinois Commercial Men's Ass'n., 255 Fed. 797 (D. C. Colo.).

Pembleton v. Illinois Commercial Men's Ass'n., 124 N. E. 355, 289 Ill. 89.

The defendants in these cases were associations organized for the same purpose as appellant; they operated under By-Laws substantially similar to those of petitioner and their business was transacted in the manner described in detail above in the statement of facts. All the points raised by respondent in the present action were strenuously urged in these cases without success.

In the Tomlinson case, the defendant was an Iowa corporation and service on it was attempted in Missouri by serving the superintendent of the insurance department of Missouri under a statute practically the same as the Montana Statute. The case arose on a motion to quash this service, which motion was sustained. One of the points particularly urged on the court in this case was that the activity of members in inducing others to apply for membership constituted doing business. We have already commented on Judge Van Valkenburg's answer to this contention and invite this Court's attention to the sound reasoning which underlies the rest of his opinion, particularly to the manner in which he deals, in the closing paragraphs, with the suggestion that the result for which petitioner here contends will work hardship on the members or their beneficiaries.

> "I am of opinion that the defendant is not doing business in this state in any substantial sense. If it is, then in practically all cases where policies of insurance are issued by foreign companies to citizens of Missouri they can and must be held to be doing business here.
>
> * * * * * * * * *

The defendant is located at Des Moines, Iowa. Its By-laws provide that all applications for membership shall be presented to the Board of Directors, who meet only in Des Moines, and no person shall be considered as a member, nor shall the Association be liable in any manner, to any person as a member therein, until the said directors have accepted his application and a certificate of membership has been issued to him. The consummation of the contract is accomplished in the State of Iowa, and the affidavits of the president and of the secretary and treasurer of defendant positively and affirmatively state that such was the procedure in the instant case.

* * * * * * * * *

It is true that it is less convenient and probably more expensive, for the plaintiff to prosecute her action in Iowa, where valid service can readily be procured; nevertheless this is one of the incidents of doing business with a foreign insurance company of the character of this defendant, which does business almost, if not quite, exclusively with commercial travelers who live in widely separated localities. It may be doubted whether the burden imposed upon the entire membership of such an association, depending, as it does, entirely upon moderate assessments for the payment of losses, as a result of being compelled to defend presumably in every state of the Union, would not outweigh the physical and financial inconvenience of the individual beneficiary. However, this may be, the law must be administered as it is found to apply, and the plaintiff is not left without her remedy, but may pursue it, if valid and subsisting, in the proper jurisdiction."

The Schwayder case was an action begun in the State Court in Colorado against an Illinois association, and removed to the Federal Court, where the defendant appeared specially and moved to quash the service of summons which had been made on the Colorado Insurance Commissioner in accordance with the Colorado Statute and also the service made on one Mitchell, a member, and alleged to be an agent, of the defendant. The motion was granted.

The facts as to the defendant's course of business are stated by the court as follows, and accurately describe the course of business of this appellant:

> "The affidavits disclose that the defendant is a mutual insurance society organized under the laws of Illinois. It extends the privilege of becoming members of the society to a restricted class, viz., traveling men. It has no paid employes to go about the country soliciting members, or transacting any business for it. It depends solely upon the good-will and enthusiasm of those who are already members. It periodically sends to members circular letters calling their attention to the advantage of membership, and requesting that they recommend the society to other traveling men with a view to having them make application for membership. The universal procedure in acquiring membership is this: The applicant makes out his application in his own handwriting and mails it, with the first installment of dues, to the defendant at Chicago. The Board of Directors sit at Chicago to pass upon all applications. If an application be approved a certificate of membership is then issued to the applicant and mailed to him at his post office address indicated in his application. In the event of the death of a member proof of that fact is made out and sent to the defendant at Chicago. There is no agent or officer in Colorado, who can receive such proof or pass upon its sufficiency or who is authorized in any respect to deal with the beneficiary in adjusting the claim."

On these facts Judge Lewis found no difficulty in concluding, on the authority of recent decisions by the United States Supreme Court, that (1) defendant was not doing business in Colorado and (2) Mitchell was not in any real sense an agent of defendant. He states his opinion briefly as follows:

> "Under the State Statute the service had by leaving copies with the State Insurance Commissioner would have been good if the defendant was doing business in this state, and the service had on James

R. Mitchell would have been good if the defendant was doing business in this state and Mitchell was, at the time, its agent or representative to the extent required for that purpose. Mitchell was a member of the society, and the sole basis for the plaintiff's claim that the service on him was good, as is shown, is that it appears that he, on various occasions, solicited parties to send in their applications for membership; that he was requested to do so by circular letters received by him from the defendant, and that in this way he had authority to solicit members; that he was provided with blank forms of application, and those forms required that the applicant must be recommended by a member; that he, in September, 1917, solicited one Kobey, and that he forwarded Kobey's application when made out, and enclosed his personal check therewith for $2.10 in payment of Kobey's dues, and that said application was accepted and Kobey received as a member. On these facts I find that neither of the elements requisite to the validity of the service exists. They do not sustain but repel any conclusion that the defendant was 'doing business within the state in such a manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state the process will be valid only if served upon some authorized agent.' *Railway Co. v. McKibben*, 243 U. S. 265, 37 Sup. Ct. 280, 61 L. Ed. 710. Other cases in addition to those cited by counsel for defendant are *Tobacco Co. v. Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 52 L. Ed. 587, Ann. Cas. 1918 C. 537; *Simon v. Railway Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; and *Toledo Co. v. Hill*, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982."

The Pembleton case, decided by the Illinois Supreme Court in 1919, is the most recent case on all fours with the present case. Pembleton, a resident of Nebraska, secured a default judgment against the Illinois Association in an action commenced in Nebraska by service of process on one Weller, a member and alleged agent of defendant. The Circuit Court of Cook County enforced this Nebraska judgment and the defendant appealed. The Supreme

Court reversed the trial court. The point most exhaustively discussed by the Court is the solicitation of applicants by members. This opinion has already been referred to at length. The decisions of the United States Supreme Court bearing on this point were thoroughly reviewed and were considered sufficiently clear and conclusive to require the overruling of a former Illinois case.

In view of the cases cited, both from the decisions of this Court and other Federal Courts, and from the highest courts of other states than Minnesota, and in view of the principles which have been recognized by this Court as controlling in cases of this kind, we submit that the Record in this case does not justify the finding that the petitioner was doing business in Montana; the necessary result is that the Montana Court acquired no jurisdiction over the petitioner and its judgment is null and void and should not have been recognized by the Minnesota Courts.

II.

Irrespective of whether or not petitioner is or was doing business in Montana, the judgment herein sued on is void and unenforceable because the Montana Court rendering it had no jurisdiction over the cause of action. The action in Montana was on a contract of insurance evidenced by Benn's certificate of membership. The trial court did not find, and it can not be contended by respondent that this contract was a Montana contract. The testimony is undisputed that it was entered into in Minnesota and that it was in all respects a Minnesota contract. The Montana Courts cannot, under any circumstances, whether petitioner was or was not doing business there, acquire jurisdiction over an action arising out of a breach of such a contract by substituted service on a state

official to which petitioner has not actually consented. In other words, even if petitioner were doing business in Montana, no consent to such service could be implied as to an action on a contract which was entered into in Minnesota.

The leading and most authoritative case with reference to the requirements for jurisdiction over an action on an insurance policy issued by a foreign corporation is *Old Wayne Life Ass'n. v. McDonough*, 204 U. S. 8. It was there held that, whether or not a foreign insurance company is doing business within a state, substituted service, i. e., service on a state official, unless expressly consented to, cannot under any circumstances, give the courts of that state jurisdiction over transactions and causes of action arising outside the state. And this case has been followed as establishing the general rule applying, not only to insurance companies, but to all foreign corporations, and not only to causes of action based on contract but to those based on tort.

Simon v. Southern Ry., 236 U. S. 115.

The doctrine of the Old Wayne and Simon cases has never been questioned. It will be noted that this doctrine does not purport to cover cases where there was service on an actual agent of the foreign corporation and this includes an official of the state when he is appointed agent for service by a written instrument which can be construed to include actions arising in other states.

Until this Court passed upon the question in *Pennsylvania Fire Insurance Company v. Gold Issue Mining Company*, 243 U. S. 93, there was considerable diversity of opinion as to whether or not the doctrine of the Old Wayne and Simon cases did reach the case of service on an agent actually authorized to accept it. That case arose on a

writ of error to the Supreme Court of Missouri, the judgment below being affirmed. We invite the Court's attention to the exhaustive discussion of this question by the Missouri Supreme Court which was referred to with approval by this Court.

Gold Issue Mining Company v. Pennsylvania Fire Insurance Company, 267 Mo. 524, 184 S. W. 999.

In the brief opinion by Mr. Justice Holmes in the case last cited, the doctrine of the Old Wayne and Simon cases is specifically recognized but distinguished in the following passage:

> "The defendant relies upon *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8, and *Simon v. Southern Railway Co.*, 236 U. S. 115. But the distinction between those cases and the one before us is shown at length in the judgment of the court below, quoting a brief and pointed statement in *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432. In the above mentioned suits the corporations had been doing business in certain states without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other states. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented. Of course, as stated by Learned Hand, J., in 222 Fed. Rep. 148, 151, D. C. S. D., N. Y., this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction. *Lafayette Insurance Co. v. French*, 18 How. 404. *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353. But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put

upon it by act. *The Eliza Lines*, 199 U. S. 119, 130, 131."

The reluctance of this Court to hold a foreign insurance company which is not doing business within a state subject to suit on causes of action arising outside the state is so marked that unless there has been a decision of the State Court construing its own Statute or the statutory appointment of an agent for service which is filed pursuant to such Statute, this Court will not construe such an appointment so as to make it apply to causes of action arising in other states.

Robert Mitchell Furniture Company v. Selden Breck Construction Company, Adv. O., 66 L. Ed. 102.

In that case the court again recognized the doctrine of the Old Wayne and Simon cases when it said:

> "But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the state without appointing one. In the latter case the implication is limited to business transacted within the state. *Simon v. Southern R. Co.*, 236 U. S. 115, 131, 132, 59 L. Ed. 492, 500, 501, 35 Sup. Ct. Rep. 255; *Old Wayne Mut. Life Asso. v. McDonough*, 204 U. S. 22, 23, 51 L. Ed. 345, 351, 27 Sup. Ct. Rep. 236. Unless the state law, either expressly or by local construction, gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least, if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence."

The facts of the present case bring it clearly within the doctrine of the Old Wayne case. The petitioner never has been licensed to do business in Montana and never has

filed an appointment of an agent for service as required by the Montana Statutes. The service was not on any actual agent of the petitioner but on the state officials of Montana. The contract was made in Minnesota. These facts are not denied and cannot be denied by the respondent. Applying the doctrine of the Old Wayne case, the petitioner under these circumstances cannot be, in an action arising out of a Minnesota contract, served with process by service on the state officials of Montana even if it is doing business in Montana contrary to the Montana Statutes.

In the Old Wayne case the original action was brought in Pennsylvania by a resident of that state on a policy of insurance executed in Indiana by an Indiana company. Service of summons was made on the Insurance Commissioner of Pennsylvania under a statute authorizing it. On the failure of defendant to appear, judgment was entered by default. An action was then brought in Indiana on the Pennsylvania judgment. The plaintiff prevailed in the State Courts but the defendant appealed to the United States Supreme Court and obtained a reversal. Mr. Justice Harlan, in delivering the opinion of the Court, after a consideration of the question of whether or not the defendant was doing business in Pennsylvania, discards this question as immaterial in the following language:

> "But even if it be assumed that the insurance company was engaged in some business in Pennsylvania at the time the contract in question was made, it can not be held that the company agreed that service of process upon the Insurance Commissioner of that commonwealth would alone be sufficient to bring it into court in respect to all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania."

His closing remarks further indicate that the fact that the contract was made in Indiana was the controlling feature of the case:

> "Conceding then that by going into Pennsylvania without first complying with its Statute, the defendant association may be held to have assented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. Indeed, the Pennsylvania Statute, upon its face, is only directed against insurance companies, who do business in that commonwealth—'in this state.' While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its power there, should be held to have assented to terms as to such business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business.
>
> As the suit in the Pennsylvania Court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the Insurance Commissioner, without any legal notice to the defendant association and without its having appeared in person, or by attorney or by agent in the suit; and as the act of the Pennsylvania Court in rendering the judgment must be deemed that of the state within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which by the Constitution is required to be given to the public acts, records and judicial proceedings of the several states, and was void as wanting in due process of law."

In the Simon case, the facts of which are not pertinent

to the present issues, the doctrine of the Old Wayne case is well stated by Mr. Justice Lamar, and the inconveniences resulting from any other rule are pointed out. The action there was based on a tort but the court makes no distinction on this ground.

> "Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Assn. v. Phelps*, 190 U. S. 147; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association v. McDonough*, 204 U. S. 22, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

It is impossible to distinguish the case at bar from the Old Wayne case in any material respect. The record is clear to the effect that the contract was made in Minnesota, the summons was served only on state officials, and under these circumstances the Old Wayne case con-

clusively establishes that there was no jurisdiction in the Montana Courts, and the enforcement of a judgment rendered without jurisdiction would be a violation of the Fourteenth Amendment to the Federal Constitution.

The rule of the Old Wayne case has been expressly applied to facts identical with those presented on this appeal.

Tomlinson v. Iowa Traveling Men's Assn., 251 Fed. 171, 173 (D. C. W. D. Mo.).

The rule of the Old Wayne case is so clearly stated in the cases already cited and is so obviously applicable to the facts of the present case as to be decisive irrespective of the Court's decision of other questions presented.

III.

In their brief submitted to the Minnesota Supreme Court, counsel for the respondent contended that the petitioner, by appearing specially in the District Court of Montana, and objecting to the jurisdiction of that Court, thereby gave that Court jurisdiction to determine its own jurisdiction, and is now estopped from disputing the correctness of that Court's determination. We assume that the same contention will be made here.

Any such claim is at variance with the accepted purpose and the generally understood effect of an objection to the jurisdiction of a Court such as was made in this case.

The petitioner in appearing specially before the Montana Court and objecting to its jurisdiction, asked no relief, the granting of which required the Montana Court to assume jurisdiction over it. This is universally recognized as the test of whether or not an appearance before a Court confers on that Court jurisdiction.

In the case at bar the objection was made broadly to the assumption by the Montana Court of any jurisdiction over the petitioner, because it was without the state, had not been served with any process within the state, and had not consented to the jurisdiction of the Montana Courts. It cannot, therefore, be held that the Montana Court, by overruling this objection to its own jurisdiction, committed the petitioner to its jurisdiction. That would be to hold that the petitioner assented to the very thing which it expressly dissented from in making the objection.

The determination by the Montana Court that it had jurisdiction was necessarily involved in the rendering of a judgment against the petitioner, irrespective of whether or not any objection was raised to its assumption of jurisdiction. Whether the petitioner appeared specially and objected to the Court's jurisdiction or took no action whatever, the entry of the judgment would have the same effect. By its judgment the Montana Court necessarily determined that it had jurisdiction of the petitioner and of the cause of action, and yet a judgment is always open to collateral attack on the ground that the Court rendering it had no jurisdiction, irrespective of any recital to the contrary in the judgment itself or any finding by the Court entering the judgment that it had jurisdiction.

Thompson v. Whitman, 18 Wall. 457.

Noble v. Union Logging Railroad, 147 U. S. 165.

Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 287.

The position of the respondent in this regard has some apparent force only because a State Court assuming jurisdiction over a person admittedly within the state may determine the existence or non-existence of facts which make the exercise of jurisdiction proper and legal. Deci-

sions may of course be found so holding, and, because of the different senses in which the word "jurisdiction" is used, some of the language in such cases will lead to confusing them with cases such as the one at bar, unless it is read in the light of the facts involved. Such a principle can have no application to such a case as this where the Courts of Montana had not acquired and could not acquire jurisdiction over the petitioner through service of process on a Montana state official.

A distinction may be drawn from the few cases which discuss this question between jurisdiction depending on facts of a local or intrastate nature and jurisdiction depending on facts of a foreign or interstate nature. Where a defendant is within a state and is served personally (or, in the case of a corporation, by service of an actual agent) within the state, the state as a sovereignty necessarily has jurisdiction in the broad sense of the word, viz., the power to deal with the defendant, but a question may nevertheless arise as to whether, by reason of the fact that process was not served in the manner prescribed by the local statute or by reason of the fact that there was fraud in procuring the service of process, the state will exercise the power or jurisdiction which it admittedly has. In such a case a defendant appearing and raising an issue as to these facts may well be held bound by the determination of the trial court, subject only to the right of appeal. But when the Courts of one state seek to exercise an extraterritorial jurisdiction over a citizen of another state, who is not actually within its borders, an objection to the exercise of such jurisdiction cannot confer it either under the full faith and credit clause of the Federal Constitution, or on any other principle applicable to Federal or interstate questions.

All the cases supporting the doctrine of estoppel by special appearance involve simply questions of jurisdiction in the local sense, i. e., in none of them was there any attempt to obtain jurisdiction over persons or property not within the territorial boundaries of the state. In all of them actual personal service was had within the state upon the defendant, or if the defendant was a corporation upon an actual agent or officer of the defendant, which is the same as personal service on an individual.

In the leading case of *Sipe v. Copwell*, 59 Fed. 971, the action was on a foreign judgment rendered in Rhode Island. Personal service was had upon the defendants while in Rhode Island and there was, therefore, no question but that the defendants were subject to the control of the state of Rhode Island. The defense was that the Court did not obtain jurisdiction because the defendants were in attendance upon the Supreme Court of Rhode Island as parties in another action when the service was made. These facts raised a question as to the jurisdiction of the Court in the local sense as distinct from the jurisdiction of the state of Rhode Island in the international sense. The following passages from Judge Lurton's opinion sustain our interpretation of the case and indicate that it has no application to the present case (Italics ours):

> "Is the judgment of the Rhode Island Court void? We think it is not. That Court had jurisdiction of the subject matter; this is not contested. *It had jurisdiction of the defendants by personal service* of the writ of summons."
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> * * * * * * * * *
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> "*It is not a question as to the effect of constructive or substituted service* as in *Pennoyer v. Neff*, 95 U. S. 714. *There was actual service of process.* Whether there was an abuse of the process of the Court was a question for the determination of the Court whose

> process is complained of. * * * Having jurisdiction of the subject matter and of the person by actual service of process, it had the power to determine for itself that its process had not been abused nor the jurisdiction acquired fraudulently."

In *Tootle v. McClellan*, 103 S. W. 766 (Ind. Terr.), the original action was brought in Missouri and personal service was made on the defendant while in that state. Defendant appeared specially and moved to quash the service on the ground that he had been enticed into the state to take depositions. This motion was denied and judgment was entered by default. In an action on this judgment in Indian Territory it was held that defendant could not again contest the jurisdiction of the Missouri Court on this ground. Here again no question of jurisdiction in the international sense was involved.

The opinion in the last cited case contains a thorough discussion of the principle of estoppel by special appearance and also a complete review of the authorities, and makes it apparent that this principle has no application to a case like the present where there has been no actual personal service within the state. The Court says in part:

> "After a careful examination of the authorities, we have been able to find but one case holding a different doctrine; but it will be seen by an examination of it (*Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447) that while the Court say the fact that one Court finds it has jurisdiction does not give it jurisdiction, and that it may be shown in a collateral proceeding in another state that it in fact did not have jurisdiction, still in that case the Texas Court took jurisdiction by reason of service out of the state on a non-resident and thus undertook to give to its laws extra territorial effect, and the Supreme Court of New York held that the finding of the Texas Court that it had jurisdiction was not binding on the defendant, even though he had appeared specially and moved

to quash. It will be observed, however, that the Texas Court did not find the existence of facts which, if true, would give it jurisdiction, but it found that it had jurisdiction upon a state of facts which did not, in fact, give it jurisdiction. There is a fundamental and important distinction between the two. We approve of the opinion of the Supreme Court of New York in the case of *Jones v. Jones, supra*, upon the facts appearing in that case, although the language of the Court, that 'the fact that a Court finds it has jurisdiction does not give it jurisdiction,' applied generally is too broad. And in this case, if jurisdiction had been obtained, or attempted, by the Missouri Court by personal service without the limits of the state, or by publication of a warning order, as in *Pennoyer v. Neff, supra*, and the Missouri Court had held, upon such facts, that it had jurisdiction, we would have no hesitancy in holding that, in thus attempting to give its laws extra-territorial effect, it acted without authority of law, and its exercise of jurisdiction would be void. But this case presents no such aspect."

Applying the rule as stated in the passage quoted to the facts of the case at bar, we find that the Montana Court has found that, on the facts stated in the affidavit filed in support of the motion to quash the service, they had jurisdiction of the petitioner. The facts stated in the affidavit are the same as those brought out on the trial in Minnesota. The respondent is demanding that the petitioner be held bound by the ruling of the Montana Court that on these facts it had jurisdiction. This is exactly the situation which the Supreme Court of Indian Territory distinguished in the case cited and the exact situation to which the doctrine of estoppel by special appearance does not apply, i. e., where the Court in which the special appearance is made finds that it has jurisdiction on a state of facts which under the Federal Constitution cannot give it jurisdiction.

In *Jones v. Jones*, 15 N. E. 707 (N. Y.), which is cited and distinguished in the passage last quoted, the original action for divorce was commenced in Texas and service was made on the defendant in New York. The defendant appeared specially to attack the jurisdiction of the Texas Court but his motion to quash the service was overruled. The defendant subsequently sued for divorce in New York and was met with a plea setting up the Texas judgment. The New York Court held that the defendant was bound by the Texas judgment, but solely upon the ground that he had proceeded to trial on the merits which, under a Texas Statute, waived the question of jurisdiction. The Court specifically stated, however, that had it been simply a case of special appearance and nothing more, the objection to the jurisdiction of the Texas Court would still have been open to the defendant.

Neither the doctrine of estoppel by special appearance nor the limitation thereof to cases involving questions of jurisdiction in a strictly local sense, has ever been specifically stated by the United States Supreme Court. But that this doctrine, if valid at all, must be so limited is apparent from the general language of this Court in all the cases which discuss the question of jurisdiction in the broad or international sense.

In *Thompson v. Whitman*, 18 Wall. 457, 468, it was said:

> "But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the Court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can effect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force."

The distinction between the two types of jurisdictional questions was well brought out in *Noble v. Union River Logging Railroad*, 147 U. S. 165, where it is said:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the Court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action. * * *
>
> "There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the Court, cannot be attacked collaterally. With respect to these facts, the finding of the Court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties."

In *Grover & Baker Machine Company v. Radcliffe*, 137 U. S. 287, a case where it was sought to enforce in Maryland a judgment entered by confession in Pennsylvania, this Court said, at page 298:

> "A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, *this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the state entering judgment;* and it is competent for a defendant in an action on a judgment of a sister state, as in an action on a foreign judgment, to set up as a defense, want of jurisdiction, in that he was not an inhabitant of the state rendering the judgment and had not been served with process, and did not enter his appearance. *Whart. Conflict Laws*, Sections 32, 654, 660; *Story, Conflict Laws*, Sections 539, 540, 586."

Cases cited and relied upon by respondent, to which we have here referred in order that a reply brief may be avoided, do not reach the facts of the present case but expressly

except such a case from the operation of the doctrine of estoppel which is urged, and the fundamental conception of its being impossible for a state to give to its laws an extra-territorial effect is inconsistent with the application of the doctrine to this case.

Nor does the procedure which respondent's counsel argued in the State Court should have been followed by the petitioner appeal to us or accord with what we believe to be the universally recognized proper practice.

When sued in Montana the petitioner might either, by appearing specially, notify the Court of the fact that it did not have jurisdiction, and object to its arbitrarily taking jurisdiction, or do nothing and allow a default judgment to be entered against it. If the respondent's position is correct, the petitioner is necessarily relegated to the second alternative of permitting the entry of a default judgment against it in Montana. There are many reasons why this course would not afford the protection to the petitioner to which it is entitled. Suffice it to say that irrespective of the validity of such a judgment, the mere existence of it would result in irreparable injury to the reputation of the petitioner, on which its very life depends.

There is no apparent reason from a practical or legal point of view why a Minnesota corporation should not be permitted to present to any Court where an action against it is started an objection to that Court's assumption of jurisdiction which it does not in fact possess, and thereby attempt to induce the Court to restrict its action to matters within its jurisdiction, without running the risk of barring itself thereafter from showing that the Court in fact exceeded its jurisdiction. Whether or not the Montana Court had jurisdiction to enter the judgment in suit

is a question arising under the Constitution of the United States. The Montana Court may have ruled on this question, as indeed it must in every case of its own motion, even though the point is not raised by the parties, but it cannot by any act of its own validate its judgment against a party over whom it is prohibited by the Federal Constitution from exercising any jurisdiction.

It is significant that it appears from the report of *Mutual Reserve Association v. Phelps*, 190 U. S. 147, that there had been a special appearance in the state where that action was originally brought, and yet this Court makes no mention of the doctrine of estoppel, although it is apparent from the opinion that it was considerably troubled by the other questions involved and should have been more than willing to adopt so easy a method of disposing of the case if in fact this doctrine of estoppel is sound as applied to the facts here involved.

In the absence of any direct discussion of this point in the decisions of this Court and the infrequent discussions of it by other Courts, we confidently submit to this Court —having in mind the general understanding of members of the Bar as to the purpose and effect of an objection to the jurisdiction of a Court by special appearance and the general practice based thereon—that the objection made by the petitioner in this case to the jurisdiction of the Montana Court did not bring the petitioner within that jurisdiction and did not give the Montana Court extra-territorial jurisdiction.

IV.

The Trial Court was in error in allowing plaintiff eight per cent interest on the amount of the Montana judgment, even if we assume that the other rulings of the Trial

Court can be sustained.

By Statute in Montana judgments carry interest at eight per cent, but in an action on a foreign judgment the law of the forum governs the rate of interest which may be recovered and not the law of the state where the judgment was rendered.

Section 5805, General Statutes Minnesota, 1913, establishes six per cent as the rate of interest on "any legal indebtedness" unless otherwise "contracted in writing." A judgment is legal indebtedness, but it is not a contract. The Minnesota Court has said in *Olsen v. Dahl*, 99 Minn. 433, at 436:

> "It is not at all difficult to demonstrate theoretically at least, that a judgment is a contract. Blackstone makes the statement in his commentaries that it is, and some of the authorities, following in line with his theory, have classed it with specialties. 3 *Blackstone Comm.* 160; *Sawyer v. Vilas*, 19 Vt. 43. But a practical consideration of the question, in the light of the essentials to the existence of valid contract relations, leads to the contrary conclusion. In fact, the weight of authority, both in England and this country, is to the effect that a judgment is not a contract in any proper sense of the term."

Similar reasoning has been adopted by this Court in holding that a statute changing the rate of interest recoverable on judgments may apply to those already existing without impairing the obligation of contracts.

Morley v. Lake Shore Ry. Co., 146 U. S. 162.

It is generally recognized that the law of the forum determines the rate of interest which can be recovered on a foreign judgment.

Clark v. Child, 136 Mass. 344.

Wells Fargo & Co. v. Davis, 12 N. E. 42 (N. Y.).

In the Wells Fargo case the foreign judgment expressly provided for interest at the rate of ten per cent according to the laws of Utah where the judgment was rendered. It was held error to allow recovery of interest in excess of the New York rate, the reason being that interest on a judgment is recoverable not by virtue of an implied contract, but as damages for delay in performing the obligation created by the judgment.

In *Clark v. Child*, *supra*, the judgment sued on had been entered in California and by its express terms carried interest at seven per cent, whereas the Massachusetts rate was six per cent. This is a leading case on the subject and the Court's clear and concise statement of the principles involved was as follows:

> "The remaining question is as to the rate of interest which the plaintiff is entitled to recover. In suits upon judgments, interest is recoverable, not as a sum due by contract of the parties, but as damages, and follows the rule in force in the jurisdiction where the suit is brought. It has therefore been held, that, in such suits upon judgments of sister states, the plaintiff recovers interest according to our laws, and not according to the laws of the state in which the judgment is rendered. *Barringer v. King*, 5 Gray, 9; *Hopkins v. Shepard*, 129 Mass. 600. If, by the general laws of California it was provided that, upon all judgments of its Courts, interest should run at the rate of seven per cent, this provision would not operate in another state in a suit upon a judgment. The fact that the provision is embodied in the record of the judgment cannot give it greater force. It is not an essential part of the judgment which other states are bound to respect and enforce, but affects the remedy upon it, which is governed by the *lex fori*. One state cannot thus control the remedy and determine the rule of damages which shall govern sister states in which a remedy is sought upon such judgment."

This Court has expressly recognized the rule of the New

York and Massachusetts cases as established law.

Morley v. Lake Shore Ry. Co., supra.

The basis of the correct rule as stated above is that interest is recoverable as damages for the delay in paying the judgment, and the Minnesota Court has repeatedly stated and decided that this is the true nature of the right to interest in the absence of express contract.

Ormond v. Sage, 69 Minn. 523.

Schrepfer v. Rockford Ins. Co., 77 Minn. 291.

It necessarily follows from this rule as to the real nature of interest recoverable on judgments, which is recognized in Minnesota and elsewhere, that the rate of such interest is purely a matter of remedy and as such is to be determined according to the law of the forum where action is brought on the judgment.

Respectfully submitted,

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MINNESOTA COMMERCIAL MEN'S ASSOCIATION *v.* BENN, EXECUTRIX OF BENN.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 103. Argued January 12, 1923.—Decided February 19, 1923.

1. A judgment by default rendered against a foreign corporation on process served on a state officer as its agent, in a State in which it has done no business, nor otherwise consented to be so served, is void. P. 145.
2. Upon facts stated, *held:* (*a*) That a contract of insurance made between a mutual insurance company and a person domiciled in another State, through acceptance at the company's home office of an application received by mail, was a contract made and to be performed in the State of the company's domicile; and
(*b*) That the company could not be said to be doing business in the other State merely because one or more of its members, at its suggestion but without authority to obligate it, solicited new members there, or because it insured persons living there, mailed notices to them and paid losses by checks upon its home bank, mailed from its home office. P. 144.

149 Minn. 497, reversed.

CERTIORARI to a judgment of the Supreme Court of Minnesota affirming a judgment recovered by the respondent against the petitioner in an action based on a Montana judgment.

Mr. A. V. Rieke and *Mr. David F. Simpson,* with whom *Mr. Wm. A. Lancaster, Mr. John Junell, Mr. James E. Dorsey* and *Mr. Robert Driscoll* were on the brief, for petitioner.

Mr. Alphonse A. Tenner, with whom *Mr. M. H. Boutelle*, *Mr. Arthur M. Higgins*, *Mr. Edward E. Tenner* and *Mr. T. H. MacDonald* were on the brief, for respondent.

The petitioner was doing business in Montana, the certificate or policy was made and is payable in Montana, and is governed by the laws of that State. *Iowa State Traveling Men's Assn.* v. *Ruge*, 242 Fed. 762; *Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407; *Connecticut Mutual Iife Ins. Co.* v. *Spratley*, 172 U. S. 602; *Herndon-Carter Co.* v. *Norris & Co.*, 224 U. S. 496; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245; *Mutual Reserve Fund Life Assn.* v. *Phelps*, 190 U. S. 147.

The ruling of these cases was not modified by *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573; and *Provident Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103.

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner is a mutual assessment, accident and health insurance company, incorporated under the laws of Minnesota, with many members scattered throughout the Union. It issued a certificate of membership to Robert J. Benn, of Montana. He died in 1915, and his executrix—respondent here—instituted an action against the Association in a Montana court to recover the sum said to be due under the rules. After service of summons and complaint upon the Secretary of State and the Insurance Commissioner, judgment was entered by default. Thereafter she brought an action in Minnesota upon the judgment and prevailed both in the trial and Supreme Court. 149 Minn. 497.

Defending, the Association claimed that it had never done business in Montana or consented to service of process there; that the insurance contract was executed and to be performed in Minnesota; that the Montana

court was without jurisdiction, the judgment void, and enforcement thereof would deprive petitioner of property without due process of law contrary to the Fourteenth Amendment.

The decision here must turn upon the effect of the process served on the Secretary of State in Montana. Did the court there acquire jurisdiction to enter judgment?

The Supreme Court of Minnesota followed *Wold* v. *Minnesota Commercial Men's Association* (1917), 136 Minn. 380, wherein the opinion referred to *Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602, and *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, but did not cite *Hunter* v. *Mutual Reserve Life Insurance Co.*, 218 U. S. 573, or *Provident Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103.

Section 6519, subdivision 3, Montana Revised Code of Civil Procedure (1915) provides—"Any corporation organized under the laws of the state of Montana, or doing business therein, may be served with summons by delivering a copy of the same to the president, secretary, treasurer, or other officer of the corporation, or to the agent designated by such corporation. . . . And if none of the persons above named can be found in the state of Montana, and an affidavit stating that fact shall be filed in the office of the clerk of the court in which such action is pending, then the clerk of the court shall make an order authorizing the service of summons to be made upon the Secretary of State, who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said Secretary of State shall be deemed personal service upon said corporation."

Petitioner has never maintained any office except in Minneapolis, Minnesota; its business is transacted there; it has never owned property or sought permission to do business in any other State.

Applications for membership are presented on printed forms, usually by mail. The by-laws provide that no person can secure membership until the board of directors has accepted his application at the home office and certificate has issued. Such certificates are mailed as directed by the applicants.

Assessments and dues are payable at the Minneapolis office and notices in respect of them are mailed to members at their last known addresses.

New members are procured by advertisement and through the solicitation of older ones. The latter are urged to furnish lists of prospects and to use their influence to increase the membership; but no member has authority to bind the Association. Although not essential, applications frequently bear a member's recommendation. Soliciting members receive no compensation except occasional premiums or prizes. No paid solicitors or agents are employed.

Losses are settled by checks on Minneapolis banks mailed from the home office. Proofs of loss must be made on the forms provided. In case the attending physician's certificate is inadequate, the Association procures additional information through some local physician, but no resident physicians are employed outside of Minnesota. The right to make further investigation is reserved; but there is no evidence to show anything has been done under this reservation in the present case. Losses are adjusted by the directors in Minneapolis.

The Association accepted Robert J. Benn's application for health insurance, solicited and recommended by Harry K. Hartness, a member, November 6, 1908, and a further application for additional protection May 3, 1911. These were sent by mail from Kalispel, Montana, where both individuals resided. Notices were regularly mailed to Benn at his home address, and he paid dues and assessments in the ordinary course. It does not appear that there was any-

thing unusual or irregular in the proofs of death or the report of attending physician. Without further investigation and upon unsolicited information received through the mail, the Association declined to pay.

Respondent claims that the facts show petitioner was doing business in Montana and the insurance contract was made and payable there. And it is said this contention is supported by *Connecticut Mutual Life Insurance Co.* v. *Spratley, supra,* and *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Meyer,* 197 U. S. 407.

Considering all the circumstances, it seems sufficiently clear that the agreement incident to membership is a Minnesota contract, there made and to be performed.

The Montana court was without jurisdiction unless petitioner by doing business in the State impliedly assented that process might be served upon the Secretary of State as its agent. "If an insurance corporation of another State transacts business in Pennsylvania without complying with its provisions it will be deemed to have assented to any valid terms prescribed by that Commonwealth as a condition of its right to do business there; and it will be estopped to say that it had not done what it should have done in order that it might lawfully enter that Commonwealth and there exert its corporate powers." *Old Wayne Mutual Life Association* v. *McDonough,* 204 U. S. 8, 21.

The circumstances chiefly relied on to show that petitioner was doing business in Montana are these: The insured was asked to send in his application, upon a form furnished by the Association, by Hartness, one of its members and a resident of Montana, who with other members had been requested to procure such applications. The form was filled and signed in Montana and then sent to Minneapolis with the requisite fee. It was accepted and certificate of membership mailed to the applicant. After customary notices from the Association, with which blank applications for new members were commonly enclosed,

the insured sent dues and assessments from his home in Montana to Minneapolis by mail and received receipts—all according to the usual method. Other members of the Association resided at Kalispel. The Association reserved the right to investigate all claims for sickness, accident or death.

Considering what this Court held in *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 531; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79; and *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough "to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *People's Tobacco Co.* v. *American Tobacco Co., supra*, 87.

It also seems sufficiently clear from *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Hunter* v. *Mutual Reserve Life Insurance Co., supra*, and *Provident Savings Life Assurance Society* v. *Kentucky, supra*, that an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office. See also *Pembleton* v. *Illinois Commercial Men's Association*, 289 Ill. 99.

We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment.

Reversed.